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APPENDIX

Supreme Court of the United States

Octobter Term, 1973

No. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI AND
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OF NORTH CAROLINA, INC.
AND RAY F. MESSICK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF NORTH CAROLINA

PETITION FOR CERTIORARI FILED MAY 29, 1973
CERTIORARI GRANTED OCTOBER 15, 1973

Supreme Court of the United States

October Term, 1973

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 71-CUS-5060

STATE OF NORTH CAROLINA :
COUNTY OF FORSYTH :

ULYSSES VERNON BEASLEY, :
EMIDIO J. BASSETTI, AND :
JOE W. JONES, :
Plaintiffs, :
v. : **No. 72-1597**

FOOD FAIR OF NORTH CAROLINA, :
INC., AND RAY F. MESSICK, :
Defendants. :

COMPLAINT

COMES NOW the Plaintiffs, and complaining of the Defendants, says and alleges:

I.

That the Plaintiffs are residents of the State of North Carolina and were residents of this State at all times material herein.

II.

That Defendant Food Fair of N.C., Inc., is a North Carolina corporation operating at all times material herein a number of grocery stores in Forsyth County, North Carolina.

III.

That Defendant Ray F. Messick is a resident of Winston-Salem, North Carolina and is an officer and director of the above-mentioned corporate defendant.

IV.

That each of the Plaintiffs were employed by the Defendant Food Fair for at least 10 years prior to June 25, 1971 in its Winston-Salem, North Carolina Stores, and at all times material herein, had contracts of employment with said Defendant whereby Plaintiffs were to serve Defendants as meat market managers for a weekly wage.

V.

That in April, 1971, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, instituted an organizing campaign among Defendant Food Fair's meat department employees, and following a National Labor Relations Board election on June 24, 1971, said labor organization was certified as collective-bargaining representative for all of said Defendants' meat market employees.

VI.

That Plaintiffs joined said labor organization in April and May, 1971 and that Defendants Food Fair and Messick had knowledge of this prior to June 24, 1971.

VII.

That on June 25 and 27, 1971, Defendant Messick, acting individually and as agent for Defendant Food Fair of N.C., Inc., discharged the Plaintiffs because of their membership in said labor organization, all in violation of the

laws and General Statutues of the State of North Carolina.

VIII.

That as a direct and proximate result of the Defendants' conduct, Plaintiffs have been embarrassed and humiliated in their community, have lost all means of income for the support of themselves and their families, have been unable to find other employment, and have been otherwise permanently damaged in the amount of $500,000.00.

IX.

That the conduct complained of was willful, reckless, malicious, and without the slightest regard for the rights guaranteed the Plaintiffs by the General Statutues of North Carolina, and therefore, Plaintiffs are entitled to punitive and smart money damages in the amount of $1,000,000.00.

WHEREFORE, Plaintiffs pray for the following relief:

(a) That they have and recover of the Defendants the sum of $300,000.00 actual damages.

(b) That they have and recover of the Defendants the sum of $1,000,000.00 in punitive damages.

(c) That Defendants be taxed with the costs of this action; and

(d) For such other and further relief as to the Court seems just and proper.

EUBANKS AND SPARROW

By /s/ LARRY L. EUBANKS
Larry L. Eubanks
Attorney for Plaintiffs
417 NCNB Building
Winston-Salem, North Carolina
27101
Telephone: (919) 723-0741

* * * * *

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
71-CVS-5060

NORTH CAROLINA
FORSYTH COUNTY

[Caption omitted in printing]

MOTION TO DISMISS, MOTION FOR JUDGMENT ON THE PLEADINGS, and PLEA IN ABATEMENT

NOW COMES the defendant Food Fair of N.C., Inc., pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, and respectfully moves the Court as follows:

I. *To dismiss the action* for failure to state a claim upon which relief can be granted by this Cout, and for want of jurisdiction over the subject matter. In support of this Motion, the defendant respectfully shows the Court:

(a) The National Labor Relations Board has exclusive jurisdiction over the subject matter of this action.

(b) On June 28, 1971, plaintiffs filed a charge with the National Labor Relations Board alleging unfair labor practice in violation of Section 7 and Section 8(a)(1) and (3)

of the Labor Management Relations Act (29 U.S.C. 7, 151 *et seq.*), *N.L.R.B. 11-CA-4622*, a copy of which is attached hereto as Exhibit 1 to this Motion and incorporated herein as if fully set forth in this paragraph.

(c) The same subject matter is alleged in the Complaint in the present action.

(d) The National Labor Relations Board is empowered to award a remedy not less than that authorized by North Carolina General Statute 95-83.

(e) This charge is pending before the National Labor Relations Board which has exclusive jurisdiction over unfair labor practices brought before it. (See *Douglas Aircraft v. Local Union 379*, IBEW 247 N.C. 620; 101 S.E.2d 800, at page 806).

(f) The aforesaid charges brought before the National Labor Relations Board are still pending by virtue of an appeal taken by the present plaintiffs from a decision of the Regional Director, a copy of which appeal is attached hereto as Exhibit 2 and incorporated herein as if fully set forth in this paragraph.

II. *To dismiss the action* on the ground that the plaintiffs have already been adjudicated not to be employees by the National Labor Relations Board, and, therefore, do not come within the purview of North Carolina General Statute 95-78 *et seq.*, upon which the present action is based. In support of said Motion, the defendants respectfully show the Court:

(a) Plaintiffs were adjudicated to be supervisors within the meaning of the Labor Relations Act (29 U.S.C. 7, Sections 2(3) and 2(11), by the National Labor Relations Board by Order dated June 3, 1971, a copy of which Order is attached hereto as Exhibit 3 and incorporated herein as if fully set forth; and as supervisors, they are management personnel and not subject to the provisions of General Statute 95-78 *et seq.*

III. *By way of Plea in Abatement,* the defendants respectfully show the Court:

(a) The aforesaid charges pending before the National Labor Relations Board were instituted prior to the present action, and involved the same parties and subject matter of the present action. The defendants respectfully submit that the plaintiffs are not entitled to maintain the present action by virtue of the aforesaid prior action, which is still pending.

IV. *To dismiss the action* for misjoinder of claims and for failure to state claim upon which relief can be granted, and in support of said Motion, defendant respectfully shows the Court:

(a) The Complaint alleges violations as to all four plaintiffs, but alleges damages collectively, and does not define or allege what damages were suffered by each plaintiff individually, making it impossible for defendant to defend against the claims of the individual plaintiffs.

V. *In the alternative,* the defendant moves to dismiss and for judgment on the pleadings as to Paragraph IX of the Complaint and subparagraph (b) of the prayer for relief pertaining to punitive damages, on the ground that such

punitive damages are not recoverable in this action as a matter of law. See G.S. 95-83.

WHEREFORE, the defendant Food Fair of N.C., Inc., respectfully prays the Court that the plaintiffs' motion be dismissed; and, in the alternative, if the entire Motion is not allowed, that that portion of the Complaint seeking to recover punitive damages be stricken and eliminated.

This the 14th day of December, 1971.

MOSS, GRIGSBY and MARSHALL
By /s/ ROBERT G. MOSS
Robert G. Moss

HUDSON, PETRIE, STOCKTON,
STOCKTON & ROBINSON
By /s/ R.M. STOCKTON, JR.
R.M. Stockton, Jr.
Attorneys for Defendants

[Certificate of service omitted in printing]

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
71-CVS-5060

NORTH CAROLINA :
FORSYTH COUNTY :

[Caption omitted in printing]

AFFIDAVIT

RAY F. MESSICK, being duly sworn, deposes and says:

I am President of Food Fair of N.C., Inc., one of the defendants in this action. I am the President and chief operating officer of this defendant corporation.

Each of the plaintiffs in this action was at the time alledged a manager of the meat market of one of the stores owned and operated by the defendant, Food Fair of N.C., Inc. There is a meat market at each of the corporate defendant stores and the plaintiffs, as meat market managers at their respective stores, were not responsible to either the store manager or the assistant manager. The meat markets were operated independently and each of the plaintiffs had full supervisory authority ever said meat market and the employees in the meat market. Each of the plaintiffs was supervisor of his respective meat market and its employees and had authority to hire, fire or discipline meat market employees, responsibility for directing them and adjusting their grievances by the use of their independent judgment.

The plaintiffs, as meat market managers, independently and on their own authority scheduled regular hours and overtime hours for meat market employees. Each of the plaintiffs, as meat market managers, exercised their authority to grant time off and to tell meat market employees what to do in their employment in the meat market. Each of the plaintiffs were paid more than other employees, were provided more life insurance by the defendant corporation, get more sick leave and a larger Christmas bonus, as well as a year-end bonus, which the other meat market employees did not receive.

On June 3, 1971, the Regional Director of the Eleventh Region of the National Labor Relations Board issued an order adjudicating Ulysses Vernon Beasley, Emidio J. Bassetti and Joe W. Jones, plaintiffs in this case, as supervisors. This order also included all other meat managers of the defendant corporation.

There is attached to this affidavit a true copy of the decision of the NLRB.

/s/ RAY F. MESSICK
Ray F. Messick

Sworn to and subscribed before me, this 23rd day of February, 1972.

/s/ FRANCES L. ADAMS
Frances L. Adams
Notary Public

My commission expires: August 13, 1975.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FOOD FAIR of N.C., INC.[1]
Employer,

and

No. 11-RC-3330

LOCAL 525, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner.

[1] The name of the Employer appears as amended at the hearing.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claim(s) to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:[2]

---

[2] The Employer is a North Carolina corporation with eleven retail stores in Forsyth County, N.C. There are 34 employees in the unit herein found appropriate. The Petitioner seeks a unit of all meat department employees at all the stores including meat market managers. The Employer agrees with this unit except it would exclude the meat market managers as supervisors.

(continued)

All meat department employees at the Employer's stores in Forsyth County, N.C., excluding meat market managers, store managers, assistant store managers, grocery employees, produce employees, warehousemen, cashiers, office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid-off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who

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[2] (continued) There is a meat market at each of the Employer's stores with the smallest market having two employees and with the largest having eight employees. The meat managers at each of the stores are not responsible to either the store manager or assistant store manager. Neither the store manager nor assistant store manager have anything to do with the meat market at their stores. The meat market managers are under the supervision of a supervisor who travels from store to store. It is clear from the record that the meat market managers independently and on their own authority schedule both the regular hours and the overtime hours of work of the other employees in their market. Additionally the meat market managers exercise the authority to grant time off and to tell employees what work to do. They make more than the other employees, get more

(continued)

have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by Local 525, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

/s/ REED JOHNSTON

(SEAL) Dated June 3, 1971
at Winston-Salem, N.C.

Regional Director, Region 11

December 30, 1971

Larry L. Eubanks, Esq.
417 North Carolina Nat'l. Bank Bldg.
Winston-Salem, North Carolina 27101

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[2] (continued) life insurance, get more sick leave, get a greater Christmas bonus and get a year end bonus which the rank and file employees do not receive. The general policy is that the supervisor who travels from store to store hires and fires meat employees, but the managers have also exercised this authority on their own. They have also made effective recommendations to the traveling supervisor concerning the hiring and firing of employees. The record shows that at least one meat manager has effected a raise for an employee on his own authority.

Re: Food Fair of North Carolina, Inc.,
11-CA-4622

Dear Mr. Eubanks:

Your appeal in the above matter has been duly considered.

The appeal is denied. The four alleged discriminateees involved herein were supervisors within the meaning of Section 2(11) of the Act and hence were not entitled, in the circumstances herein, to the protection of the Act.

Very truly yours,
Peter G. Nash
General Counsel

By: /s/ IRVING HERMAN
Director, Office of Appeals

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IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
71-CVS-5060

NORTH CAROLINA :
FORSYTH COUNTY :

[Caption omitted in printing]

* * * * *

ORDER AND JUDGMENT

THIS CAUSE having been calendared for hearing on the Motion Docket at the February 21, 1972, week of Civil Court in and for Forsyth County, and having come on for hearing before the undersigned Judge of the Superior Court upon the defendants' Motion To Dismiss, Motion

for Judgment On The Pleadings, and Plea In Abatement, and all parties having been represented by counsel at said hearing before the undersigned Judge and having filed briefs and presented arguments for their respective clients and positions in the matter;

And the Court having considered the Motion To Dismiss, Motion For Judgement On The Pleadings, and Plea In Abatement; and the parties having stipulated that each of the plaintiffs in this cause was at all times complained of a supervisor of Food Fair of N.C., Inc.; and the defendants having further filed Affidavit of Ray F. Messick, dated February 23, 1972, without objection; and the Court having further considered the Motions filed as a Motion For Summary Judgment as provided under Rule 12(c) and Rule 56;

And the Court, having heard the matter and the arguments of counsel for all parties in the same, being of the opinion that the defendants' Motion For Judgment On The Pleadings and To Dismiss should be allowed for that the plaintiffs have failed to state a claim upon which relief can be granted; and the Court being further of the opinion that the defendants are entitled to summary judgment in their favor pursuant to Rule 56 in that the pleadings, stipulation and affidavits show that there is no genuine issue as to any material fact and that the defendants are so entitled to judgment as a matter of law; and the parties having agreed that the Judgment be presented on this date;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendants' Motion for Judgment On The Pleadings and To Dismiss is hereby allowed; that the Court has further considered said Motion as a Motion For Summary Judgment and that the defendants' Motion

For Summary Judgment is hereby allowed; that this action be and the same is hereby dismissed with prejudice; and that the costs of the action be taxed against the plaintiffs.

This the 28th day of February, 1972.

/s/ ROBERT M. GAMBILL
Robert M. Gambill
Judge Presiding

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
71-CVS-5060

NORTH CAROLINA :
FORSYTH COUNTY :

[Caption omitted in printing]

* * * * *

APPEAL ENTRIES

To the entry of the foregoing Judgment dated February 28, 1972, and for errors assigned and to be assigned, defendant in apt time objects, excepts and gives Notice of Appeal in Open Court. Further notice is waived. Appeal bond in the sum of $100.00 is adjudged sufficient. Plaintiff is hereby allowed 30 days to serve statement of case on appeal upon defendant; and defendant is hereby allowed 20 days thereafter to serve a countercase or exception.

This the 28th day of February, 1972.

/s/ ROBERT M. GAMBILL
Robert M. Gambill
Judge Presiding

ASSIGNMENT OF ERROR

The Trial Judge erred in dismissing plaintiffs action because they have been discharged from employment because of Membership in a labor organization and therefore are entitled to the protection of North Carolina General Statutes 95-78 *et seq.*

This is plaintiffs sole assignment of error which is their exception located at R.p. _____.

W. Warren Sparrow,
Attorney for Plaintiffs

OF COUNSEL:

EUBANKS AND SPARROW
417 NCNB Building
Winston-Salem, North Carolina 27101
(919) 723-0741

NORTH CAROLINA RIGHT-TO-WORK LAW

N.C.G.S. Section 95-78. Declaration of public policy. – The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association.

Section 95-79. Certain agreements declared illegal. – Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

Section 95-80. Membership in labor organization as condition of employment prohibited. – No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

Section 95-81. Nonmembership as condition of employment prohibited. – No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

Section 95-82. Payment of dues as condition of employment prohibited. – No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

Section 95-83. Recovery of damages by persons denied employment. – Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 95-80, 95-81, and 95-82 or of one or more of such sections, shall be entitled to recover from

such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

Section 95-84. Application of article. – The provisions of this article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

LABOR-MANAGEMENT RELATIONS ACT
(Selected Sections)

29 U.S.C. Section 152:

(1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by

an employer subject to the Railway Labor Act [45 Sections 151-162, 181-188], as amended from time to time, or by any other person who is not an employer as herein defined.

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. Section 164:

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [Sections 151-158, 159-168 of this title] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective-bargaining.

Copies of the letter were received by Ray F. Messick, President of Food Fair of N.C., Inc., Robert C. Moss, Esq., his attorney, and others.

No. 7221SC457 TWENTY-FIRST DISTRICT

NORTH CAROLINA COURT OF APPEALS

Spring Session 1972

* * * * *

From Forsyth

[Caption omitted in printing]

Appeal by plaintiffs Beasley, Bassetti and Jones from Gambill, Judge, 28 February 1972 Session, Superior Court, Forsyth County.

Plaintiffs jointly brought an action asking for $500,000 actual damages and $1,000,000 punitive damages, without separation of damages as to each plaintiff. They alleged that they were employed by defendant Food Fair as meat market managers. After a campaign and election, Local 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, was, on 24 June 1971, certified as collective-bargaining representative for all of defendant Food Fair's meat market employees. Plaintiffs joined this labor organization in April and May 1971, and defendants had knowledge of this prior to 24 June 1971. On 25 and 27 June 1971, defendant Messick, acting individually and as agent for defendant Food Fair, discharged plaintiffs because of their membership in the union. As a result of this, plaintiffs suffered embarrassment and humiliation in their community, lost all means of income, and have been unable to find other employment. The

plaintiffs further alleged that the conduct was "willful, reckless, malicious, and without the slightest regard for the rights guaranteed the Plaintiffs by the General Statutes of North Carolina."

Defendants filed motion to dismiss and plea in abatement. Grounds for motion to dismiss were that the complaint failed to state a claim upon which relief could be granted because the court lacked jurisdiction and because the complaint alleges violations as to all four plaintiffs but alleges damages collectively and fails to define or allege that damages were suffered by each plaintiff. By way of plea in abatement defendants alleged that a prior action involving the same parties and same subject matter was pending before the National Labor Relations Board. In the alternative, defendants moved to dismiss as to punitive damages on the ground punitive damages are not recoverable in this action as a matter of law. The court considered the motions to dismiss and for judgment on the pleadings as a motion for summary judgment and allowed it, dismissing the action with prejudice. Plaintiffs Beasley, Bassetti, and Jones appealed.

Eubanks and Sparrow, by Larry L. Eubanks, for plaintiff appellants.

McCaul, Grigsby and Pearsall, by Robert C. Moss, and Hudson, Petree, Stockton, Stockton and Robinson, by R. M. Stockton, Jr. and James H. Kelly, Jr., for defendant appellees.

MORRIS, Judge. It appears from the affidavit and copy of the National Labor Relations Board's order filed with

defendants' motion that the plaintiffs, who are meat market managers, are classified as supervisors under the definition contained in the Labor Management Relations Act. This is conceded by plaintiffs. It also appears by stipulation that plaintiffs' appeal to the General Counsel of the National Labor Relations Board from a denial of their claim under the Act was denied. The pertinent portions of the letter of denial follow: "Your appeal in the above matter has been duly considered. The appeal is denied. The four alleged discriminatees involved herein were supervisors within the meaning of Section 2(11) of the Act and hence were not entitled, in the circumstances herein, to the protection of the Act."

Statutes dealing with labor organizations are contained in Article 10 of Chapter 95 of the General Statutes, and became effective 18 March 1947. Section 95-78 declares the policy:

> "The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association."

G.S. 95-83 provides:

> "Any person who may be denied employment or be deprived of continuation of his employment in violation of §§95-80, 95-81 and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by

> appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

Plaintiffs contend that defendants have violated Section 95-81:

> "No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

Defendants, however, contend that plaintiffs are supervisors, a fact which is conceded by plaintiffs, and that under the provisions of the Labor Management Relations Act they are specifically excluded as employees entitled to protection of the Act; that the National Labor Relations Board took jurisdiction, and denied their claim because they are not afforded the protection of the Act; and that the Taft-Hartley Act, under its provisions, has excluded and preempted State jurisdiction.

This is a case of first impression in this State. Counsel have cited no authority directly in point, nor have we found any case on "all fours". Determination requires that we first consider certain sections of the Taft-Hartley Act (Labor Management Relations Act) hereinafter referred to as the Act. Reference to section numbers shall be to those adopted in United States Code Annotated, Title 29, unless otherwise indicated. Definitions are found in Section 152. Those pertinent to this appeal are:

> "(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall

include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include . . . any individual employed as a supervisor. . . ."

"(8) The term 'unfair labor practice' means any unfair labor practice listed in Section 158 of this title."

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Section 157 gives to "employees" the right "to form, join, or assist labor organizations". Section 158(a) sets out certain actions which shall be deemed unfair labor practices on the part of an employer. Among those are (1) interference with rights guaranteed to employees in Section 157 and (3) discrimination with respect to hiring or tenure of employment by reason of an employee's membership in any labor organization.

In defining "supervisors", Congress had in mind supervisory personnel traditionally regarded as a part of management and to place into the employer category those who act for management in formulating and executing its labor policies. International Union of United Brewery, etc. v.

N.L.R.B., 298 F.2d 297, (D.C. Cir. 1961), cert. denied 369 U.S. 843, 7 L.Ed.2d 847, 82 S.Ct. 875 (1962). In excluding supervisors from the rights and protections afforded employees, the purpose was to assure to employers their right to select their supervisors and to procure the loyalty and efficiency of their supervisors. National Labor Rel. Bd. v. Retail Clerks Inter. Ass'n., 211 F.2d 759 (9th Cir. 1954), cert. denied 348 U.S. 839, 99 L.Ed. 662, 75 S.Ct. 47 (1954). As was said in National Labor Relations Bd. v. Edward G. Budd Mfg. Co., 169 F.2d 571, 579 (6th Cir. 1948), cert. denied 335 U.S. 908, 93 L.Ed. 441, 69 S. Ct. 411 (1949): "We believe it is clear that Congress intended by the enactment of Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities."

Erosion of this purpose appeared with the 1947 amendment (effective 23 June 1947, after the enactment and effective date of North Carolina's Right-To-Work Act), allowing supervisors to join a labor organization. Section 164(a) provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective-bargaining."

The question of federal preemption in the labor relations field has frequently been before the courts since the enactment of Taft-Hartley. As was said in Garner v. Teamsters Union, 346 U.S. 485, 488, 98 L.Ed. 228, 74 S.Ct. 161 (1953), "[t]he National Labor Management Relations Act

. . . leaves much to the states, though Congress has refrained from telling us how much".

"When a union attempts to organize supervisors, or when supervisors elect to become members of a union, a problem of federal preemption does arise." 4 Jenkins, Labor Law, §21.9, The Federal Preemption Doctrine, p. 103. In San Diego Unions v. Garmon, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959), Mr. Justice Frankfurter, speaking for the majority, laid down certain guidelines when he said:

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7 [29 U.S.C.A. 157], or prohibited by §8 [29 U.S.C.A. 158], then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S., at p. 245.

In Hanna Mining v. Marine Engineers, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965), in an opinion by Mr. Justice Harlan, expressing the view of eight members of the Court, it was held that under the circumstances of that case, the federal act did not preempt the state's jurisdiction. Plaintiffs, employers, declined to negotiate with a union representing the marine engineers until it was established that the union represented a majority of the engineers whereupon the union picketed plaintiffs' ships. Employers petitioned that a representation election among its engineers be held. The petition was dismissed by the National Labor Relations Board on the ground that the engineers were "supervisors" under the Act, and excluded from the definition of employees. The employers' charge alleging a violation of Section 8 [29 U.S.C.A. §158] of the Act was

dismissed on the ground that the union's conduct fell outside the provisions of the Act because it sought to represent "supervisors" rather than "employees". Plaintiffs then brought suit in Wisconsin state court seeking injunctive relief. The state court dismissed for lack of jurisdiction. The Supreme Court of Wisconsin affirmed on the ground that the picketing, while illegal under Wisconsin law, arguably violated Sections 8(b)(4)(B) and 8(b)(7) of the Act [29 U.S.C.A. §158(b)(4)(B) and 29 U.S.C.A. §158(b)(7)] and so fell within the exclusive jurisdiction of the National Labor Relations Board. In reversing, the Supreme Court said:

> "The ground rules for preemption in labor law, emerging from our Garmon decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by §7, or prohibited by §8' of the National Labor Relations Act, see 359 U.S., at 244-246, and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation, cf. 359 U.S., at 245.
>
> For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors removes from this case most of the opportunities for preemption." 382 U.S., at pp. 187-188.

The Court went on to say that exclusion of supervisors from the definition of employees had the obvious result that many provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern. There cannot be protection by Section 157 nor do supervisors come within the prohibitions of Section 158. The defendants argued that Section 164(a)

ousted both state and federal authority and signified "a laissez faire toward supervisors". The Court said the position had no merit since "the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted §8(b) [29 U.S.C.A. §158(b)] is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing." 382 U.S., at pp. 189-190.

Applying what we deem to be the holding of *Hanna, i.e.*, that a state does have jurisdiction over activities of supervisors because the activities of supervisors could not be arguably either prohibited or protected under the Act, we reach the conclusion that in the case before us where, as in *Hanna,* the union members involved have been classified by the National Labor Relations Board as supervisors, the State court has jurisdiction. Plaintiffs as supervisors are not arguably either protected by Section 157 or prohibited by Section 158. While Willard v. Huffman, 250 N.C. 396, 109 S.E.2d 233 (1959), cert. denied 361 U.S. 893, 4 L.Ed.2d 150, 80 S.Ct. 195 (1959), did not deal with supervisors, we think this position is within the rationale of that holding.

We next reach the question of whether plaintiffs come within the purview of G.S. 95-83 giving the right to recover damages to any "person" whose continuation of employment has been denied because of union membership. Defendants strenuously insist that the purpose of North Carolina's Right-To-Work Statutes is the same as the Labor Management Relations Act - to protect rank-and-file employees from unfair labor practices and provide them with

the right, if they choose, to negotiate as one on an equal basis with management. They contend that to interpret the statute as including supervisors would result in the division of management into owners and supervisors, seriously weaken the position of management, and create a severe imbalance between labor and management. While we are inclined to agree, we are bound by the rules of statutory construction. "If the language of a statute is clear and unambiguous, judicial construction is not necessary. Its plain and definite meaning controls. (Citations omitted.) But if the language is ambiguous and the meaning in doubt, judicial construction is required to ascertain the legislative intent. (Citations omitted.)" Underwood v. Howland, Comr. of Motor Vehicles, 274 N.C. 473, 479, 164 S.E. 2d 2 (1968). The meaning of the word "person" certainly is clear and unambiguous and leaves no room for argument. It is defined as "an individual human being". Webster's Third New International Dictionary (1968). The term obviously includes supervisors as well as employers. We recognize the fact that this statute was enacted just a few months prior to the effective date of 29 U.S.C.A. 164(a). However, the legislature did not see fit to use the word "employee", specifically excluding supervisors from its meaning, as did the legislatures of some states in enacting right-to-work statutes. To give the plain language of the statute, by interpretation, a meaning it does not have would result in amending the statute. This is the prerogative of the legislature.

For the reasons stated herein, the judgment of the trial tribunal must be reversed. The court did not rule on defendants' motion to dismiss the prayer for relief as to punitive damages nor for misjoinder of claims. These questions, therefor, are not before us.

Reversed.

Judges VAUGHN and GRAHAM concur.

NORTH CAROLINA SUPREME COURT
Fall term, 1972

Opinion of the Supreme Court of the State of North Carolina is officially reported in 282 N.C. 530, 193 S.E.2d 911 and can be found beginning at page A.1. in the Appendix to the Petition For a Writ of Certiorari to the Supreme Court of the State of North Carolina.

SUPREME COURT, U. S.

FILED
MAY 29 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1597

ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI and JOE W. JONES,

Petitioners,

vs.

FOOD FAIR OF NORTH CAROLINA, INC. and RAY F. MESSICK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

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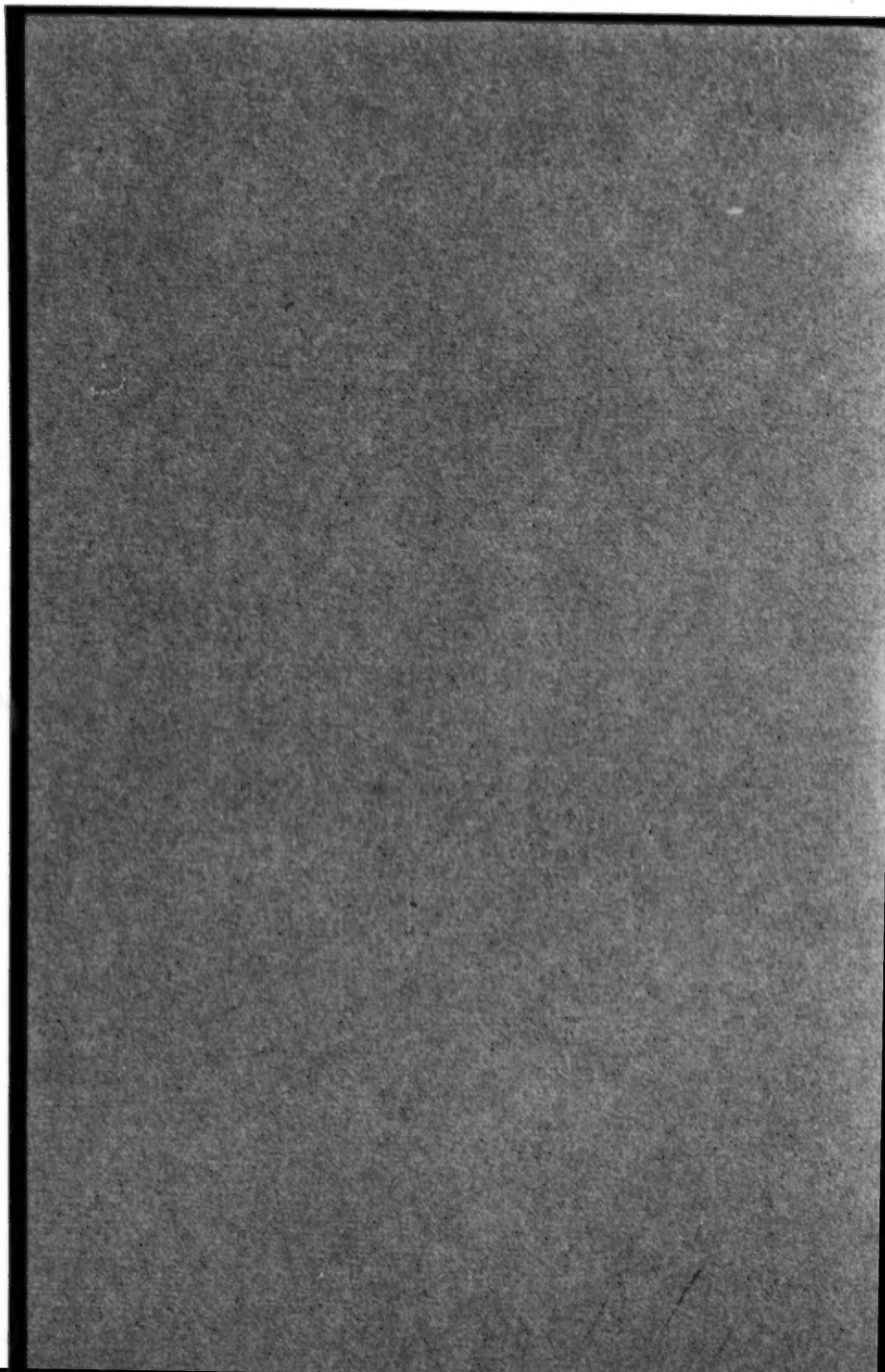

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Supreme Court of the United States

OCTOBER TERM, 1972

No.

ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI and JOE W. JONES,

Petitioners,

vs.

FOOD FAIR OF NORTH CAROLINA, INC. and RAY F. MESSICK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of North Carolina entered in the above case on January 26, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of North Carolina is reported at 15 N.C. App. 323, 190 S.E. 2d 333 (1972), which reversed summary judgment for defendant

entered by the Honorable Judge J. Gambill, at the 28 February, 1972, Session of the Forsyth County Superior Court. The opinion of the Supreme Court of the State of North Carolina is reported in 282 N.C. 530, 193 S.E. 2d 911.

JURISDICTION

The judgments of the Supreme Court of the State of North Carolina were made and entered on January 26, 1973, (193 S.E. 2d 911), and copies thereof are appended to this petition in the Appendix at pp. 1-16. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Whether there is any federal law which pre-empts a state from enacting a statute prohibiting an employer from discharging a person, *i.e.*, a supervisor, for membership in a labor union, organization, or association.

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of the North Carolina Right-to-Work Law, Chapter 328, Session Laws of 1947, codified as North Carolina General Statutes 95, Sections 78 through 84, are set forth in the Appendix at pp. 19-20.

In addition, Section 14(a) of the National Labor Relations Act, codified as 29 U.S.C. Section 164(a) is set forth in Appendix at p. 20.

STATEMENT

The plaintiffs, ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI, and JOE W. JONES, were, until June 26, 1971, employed by the defendant, FOOD FAIR OF NORTH CAROLINA, INC.. On the above mentioned date, two days after Local Union No. 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, won a majority in a National Labor Relations Board election, they were discharged. The plaintiffs, through counsel, have steadfastly averred that the said discharge was unlawful in that the plaintiffs were discharged solely due to their membership in the aforesaid Union.

The Union began an organizing campaign at defendant's Winston-Salem, North Carolina stores in the spring of 1971. In the course of that organizing campaign, the three plaintiffs named herein signed membership applications to join the Union and were accepted into membership in April and May of 1971.

On May 18, 1971, the local Union petitioned the National Labor Relations Board for an election among "all meat department employees at the Employer's stores in Forsyth County, North Carolina, but excluding store managers, assistant store managers, grocery employees, produce employees, warehousemen, cashiers, office clerical employees, guards, and supervisors as defined in the Act:" (Case No. 11-RC-3330). The Board granted the petition and ordered the election to be held on June 24, 1971. The three plaintiffs herein were excluded from participating in the election since they were determined by the Board to be supervisors. Directly after the election, they were discharged by defendant Messick, President of Food Fair Stores of North Carolina, Inc..

In June of 1971, the Union brought charges before the National Labor Relations Board alleging, *inter alia*, the discharge of the plaintiffs herein to be violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended 29 U.S.C. 141, *et seq.*. (Case No. 11-CA-4622). It was the considered opinion of the General Counsel of the National Labor Relations Board that the plaintiffs were supervisors within the meaning of Section 2(11) of the National Labor Relations Act and hence not entitled to the protection of the Act. (See letter dated December 30, 1971 – Record on Appeal to North Carolina Court of Appeals, Appendix p. 30.)

Immediately following the Board's decision that the three plaintiffs herein were not protected by Federal law, the complaint in the case at bar was filed. It alleges basically a violation of North Carolina General Statutes 95-78, 95-81 and 95-83 (see Appendix pp. 21-25).

The defendant's Motion To Dismiss, Motion For Judgment on the Pleadings, and Plea in Abatement were heard by Judge Robert M. Gambill on February 21, 1972, (R pp. 3-6, see Appendix pp. 25-29. Among other averments, the defendants asserted that the National Labor Relations Board had exclusive jurisdiction over the subject matter of this action and that as supervisors the plaintiffs were therefore not protected by the provisions of North Carolina General Statute 95-78 *et seq.* Judge Gambill ruled, by Order dated February 28, 1972, that the plaintiffs had failed to state a claim upon which relief could be granted and further that there was no genuine issue as to any material fact and that the defendants were entitled to judgment as a matter of law. (See Appendix pp. 32-33).

The plaintiffs appealed, excepting and assigning as error the ruling that the plaintiffs were not protected by North

Carolina General Statutes 95-78 *et seq.* The appeal was heard by the Court of Appeals of North Carolina during the spring term of 1972, and the full panel of judges reversed the decision of the lower Court on August 2, 1972. (190 SE 2d 333). The Court of Appeals, interpreting the decision of the United States Supreme Court in *Hanna Mining v. Marine Engineers,* 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965) as it relates to the decision in *San Diego Unions v. Garmon,* 359 U.S. 236 3 L.Ed. 2d 775, 79 S.Ct. 773, held:

> "That a state does have jurisdiction over activities of supervisors because the activities of supervisors could not be arguably either prohibited or protected under the Act (National Labor Relations Act), we reach the conclusion that in the case before us where, as in *Hanna,* the union members involved have been classified by the National Labor Relations Board as supervisors, the State Court has jurisdiction."

This view expressed by the North Carolina Court of Appeals was espoused by the plaintiffs in their initial brief before that Court:

> "Counsel must, in order to fully protect its position, establish: . . . (2) That the matter is not covered or pre-empted by Federal law, and is therefore subject to state law . . ."

Immediately upon rendition of the North Carolina Court of Appeals decision the defendants petitioned the Supreme Court of North Carolina for Certiorari, and it was granted on August 15, 1972. The defendants challenged the North Carolina Court of Appeals' interpretation

of Federal law and in particular its interpretation of the *Garmon Doctrine* and the *Hanna Mining Case.*

On January 23, 1973, the North Carolina Supreme Court published its decision reversing the North Carolina Court of Appeals. Stating its conclusion:

> "When, as in the present case, the facts disclose that plaintiffs as supervisors seek to invoke a remedy precluded by the established national policy, the doctrine of federal pre-emption applies, and the State Court is without jurisdiction over the subject matter of the controversy." (See Appendix pp. 1-18.)

The plaintiffs submit that the aforesaid decisions of the North Carolina Court of Appeals and the North Carolina Supreme Court do involve a material and substantial question of Federal law and that their evident diversity of opinion requires a hearing before the United States Supreme Court in order to clarify and firmly establish the meaning and import of its prior decisions in *Garmon* and *Hanna Mining, supra.*

REASONS FOR GRANTING WRIT

The decision below should be reviewed because it erroneously interprets the decisions of the Supreme Court in the cases of *San Diego Unions v. Garmon, supra,* and *Hanna Mining v. Marine Engineers, supra,* as they relate to the Federal Labor Law pre-emption doctrine.

The plaintiffs ground their claim for relief upon the North Carolina Right-to-Work Laws (North Carolina General Statutes 95-78 *et seq.*). These laws have been upheld by the Supreme Court of North Carolina and the United

States. *State v. Whitaker*, 228 N.C. 352, 45 S.E. 2d 860 (1947); *Lincoln Fed. L. U. v. Northwestern I. & M. Co.*, 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251, 6 A.L.R. 2d 473 (1949); 29 U.S.C. Section 164(b). The basic philosophy of these laws is expressed in North Carolina General Statute 95-78 as follows:

> "The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraint and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union of labor organization or association. (1947, C. 328, S.1).

The statutes further provide that persons may maintain causes of action for damages against their employer for violation of their provisions. (North Carolina General Statute 95-83). The plaintiffs assert that they are entitled to the protection of the North Carolina Right-to-Work Laws as they were discharged from their employment for no reason other than their membership in a labor union.

The question now before the Court is whether there is any federal law which pre-empts a state from enacting a statute which prohibits an employer from discharging a person, *i.e.* a supervisor, for membership in a labor union, organization, or association.

Prior to its amendment in 1947, the National Labor Relations Act specifically protected the right of all persons regardless of employment status to join or assist labor organizations. *Packard Motor Car Co. v. National*

Labor Relations Board, 330 U.S. 485, 67 S.Ct. 789 (1947). In 1947, however, following the *Packard* decision, the Taft-Hartley amendment was passed. These amendments specifically limited coverage of the Act to "employees" as defined in Section 2(3) of the Act. (29 U.S.C. Section 152 (3)), thereby excluding supervisors.

The belief held by the plaintiffs and others that these amendments did exclude supervisors from the scope of the Act was first determined in 1948 in the case of *National Labor Relations Board v. Edward G. Budd Manufacturing Co.*, 169 F.2d 571, cert. denied, 335 U.S. 908, 69 S.Ct. 411 (6th Cir. 1948):

> "The right of self-organization and of selection of a bargaining representative are rights which existed independently of either National or Local Labor Relations Acts. It was recognized and characterized as a fundamental right long before it was protected under the National Labor Relations Act and similar state acts . . . It was the regulation of this fundamental right of supervisory personnel formerly included within the Federal Act that the 1947 amendatory provisions left to the states for separate classification and regulation." *Id.* at p. 577.

This position was quickly adopted by the State Courts throughout the country having occasion to deal with the subject. The California Court, in *Safeway Stores, Inc. v. Retail Clerks International Association*, 41 Cal. 2d 567, 261 P.2d 721, held the exclusion of supervisory employees and the regulation of their collective bargaining rights from the National Labor Relations Act, as amended, left

the field open completely to State control. The same conclusion is reached in *Martineau v. Director of Division of Employment Security*, 329 Mass. 44, 106 N.E.2d 420. It is now clear that it is not a violation of the National Labor Relations Act to discharge a supervisor because of membership in a labor organization, though nothing in the Federal law prevents a supervisor from joining a labor organization. *National Labor Relations Board v. Inter-City Advertising Co.*, 190 F.2d 420, (4th Cir., 1954), cert. denied, 342 U.S. 908, 72 S.Ct. 301; *Texas Co. v. National Labor Relations Board*, 198 F.2d 540 (9th Cir., 1952); *Marine Officers Association, Local No. 54 v. Ohio River Sand Company*, 467 S.W.2d 758 (1971).

The Supreme Court of North Carolina, in its decision in the case at bar, has cited numerous federal cases which have held that a supervisor is not protected under the National Labor Relations Act from discharge due to union membership or activity. *National Labor Relations Board v. Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir., 1966); *National Labor Relations Board v. Charley Toppino and Sons, Inc.*, 332 F.2d 85 (5th Cir., 1964); *Oil City Brass Works v. National Labor Relations Board*, 357 F.2d 466 (5th Cir., 1966); *National Labor Relations Board v. Fullerton Publishing Co.*, 283 F.2d 545 (9th Cir., 1960); *Carpenter's District Council v. National Labor Relations Board*, 107 U.S. App. D.C. 55, 274 F.2d 564 (1959). We do not disagree with the holdings of these cases, but we do disagree with the North Carolina Supreme Court's inference that these cases evidence an intention of Federal law to pre-empt state jurisdiction over the rights of supervisors. The plaintiffs assert that the proper interpretation of all these cases indicates that in each and every case, the National Labor Relations Board

has refused to protect supervisors from wrongful discharge due to lack of jurisdiction and not due to any Federal law directly or indirectly adverse to the supervisor's privilege of membership in a labor organization, union, or association as stated in Section 14(a) of the Act, 29 U.S.C. Section 164(a):

> "*Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization,* but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either National or Local, relating to collective bargaining." (Emphasis added).

The above quoted section has been utilized throughout the course of this appeal, the plaintiffs placing emphasis on the first clause and the defendants stressing the latter. The plaintiffs reaffirm their position that the first clause adds strength to their argument that a state may legislatively protect the right of a supervisor to join a labor union, organization, or association.

Regarding the second clause, the plaintiffs wish to point out that they are seeking a remedy upon a state statute which details certain rights given to all persons within the state. The plaintiffs suggest that, therefore, no employer, the defendant included, is being compelled to deem individuals defined as "supervisors" as "employees" but rather as "persons" which they most certainly are. Whether or not the term "persons" includes supervisors is a matter for the proper State Court to determine. Also, our North Carolina law has nothing to do with collective bargaining.

Where the Supreme Court of North Carolina has envisioned a federal intention to pre-empt the field of

supervisor regulation, the Court of Appeals did not and neither do the plaintiffs. In *San Diego Unions v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959), Mr. Justice Frankfurter, speaking for the majority, laid down certain guidelines when he said:

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by Section 7 (29 U.S.C.A. 157), or prohibited by Section 8 (29 U.S.C.A. 158), then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States." 359 U.S., at p. 245.

The above guidelines were further delineated in *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). That case presents the crux of the plaintiffs' reasons for which this Writ should be granted. Mr. Justice Harlan, speaking for eight members of the Court, held that under the circumstances of that case, the Federal Act did not pre-empt the state's jurisdiction. Plaintiffs, employers, refused to negotiate with a union representing the Marine Engineers until it was established that the Union represented a majority of the engineers. In response the Union picketed the employer's ships. The plaintiffs petitioned the National Labor Relations Board requesting that a representative election be held, but the Board declined stating that the engineers were supervisors and excluded from the definition of employees. The employer's charge alleging a violation of Section 8 (29 U.S.C.A. Section 158) of the Act was dismissed on the ground that the Union's conduct fell outside

the provisions of the Act because it sought to represent "supervisors" rather than "employees". The employers next brought suit in the Wisconsin State Court seeking injunctive relief, and their suit was dismissed for lack of jurisdiction. The Wisconsin Supreme Court affirmed asserting that the matter was governed by federal law and within the exclusive jurisdiction of the National Labor Relations Board.

In reversing, the United States Supreme Court said:

> "The ground roles for pre-emption in Labor Law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a state may not regulate conduct arguably 'protected by Section 7, or prohibited by Section 8' of the National Labor Relations Act, see 359 U.S., at 244-246, and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation, Cf. 359 U.S. at 245.
>
> For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors removes from this case most of the opportunities for pre-emption." 382 U.S., at pp. 187-188.

The Court further reasoned that when the Act was amended in 1947 to remove supervisors from the definition of employees, many provisions of the Act employing that pivotal term would cease to operate where supervisors were concerned. The defendants argued, therefore, that Section 14(a) of the Act (29 U.S.C. Section 164(a)) signified a federal policy of Laissez-faire toward supervisors

ousting state as well as Board authority. The Court held that such an argument would not stand up in the light of the legislative history of the amendments. The committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. S. Rep. No. 105, 80th Cong., 1st Sess., p. 5. Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted Section 8(b) (29 U.S.C. Section 158(b)) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing. 389 U.S., at pp. 189-190.

Some legislative history pertaining to Section 14(a) of the Act, quoted above, suggests further that it was not meant to immunize any conduct at all but only to make it "clear that the amendments to the Act do not prohibit supervisors from joining unions . . . " S. Rep. No. 105, 80th Cong., 1st Sess. p. 28; H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 60.

The plaintiffs aver that the North Carolina Court of Appeals properly construed the *Hanna* decision to say that state law is not pre-empted by Federal law in the instant case. The plaintiffs suggest that no case like this has ever been adjudicated by the Supreme Court and therefore deserves the Court's attention. There is no question that *Hanna* and *Garmon* describe a shadowy area over which Federal law may extend its ever flowing cool shade, but the plaintiffs seriously question whether the facts in controversy present such a situation. The North Carolina Right-to-Work Laws state clearly that no person shall be discharged for membership in a labor organization, association,

or union. If there is a Federal law or an intention inferred by Federal law which denies the plaintiffs of this simply stated right, the plaintiffs would hope that it too could be stated as simply and clearly.

CONCLUSION

The plaintiffs respectfully seek the Court's review of the Supreme Court of North Carolina's decision in view of the conflicting and possible erroneous interpretation of the *Garmon Doctrine* and the *Hanna Manufacturing Company* case.

Although the point of law herein presented in controversy is small in scope, the effect of any final decision will be large in precedent. Citing from a petition for leave to file an *amici curiae* brief, this decision will directly effect over 270,000 employees. Wherefore, the plaintiffs seek your consideration of the federal questions presented.

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Douglas S. Punger

APPENDIX

SUPREME COURT OF NORTH CAROLINA

ULYSSES VERNON BEASLEY,
JAMES A. KIGER, EMIDIO
J. BASSETTI, and JOE W. JONES,
Petitioners,

v. No. 66 Forsyth

FOOD FAIR OF NORTH CAROLINA, INC.,
and RAY F. MESSICK,
Respondents.

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[Filed January 26, 1973]

On *certiorari* to review the decision of the Court of Appeals reported in 15 N.C. App. 323, 190 S.E. 2d 333 (1972), which reversed summary judgment for defendant entered by Gambill, J., at the 28 February 1972 Session of Forsyth Superior Court.

Plaintiffs jointly brought this action asking for $500,000 actual damages and $1,000,000 punitive damages without separation of damages as to each plaintiff. They allege that they were unlawfully discharged because of their support of and membership in the Amalgamated Meat Cutters and Butcher Workers of North America, AFL-CIO, in violation of North Carolina's Right-to-Work Law, G.S. 95-31. Plaintiffs further allege that by reason of G.S. 95-83 they were entitled to damages, both punitive and otherwise.

Defendants filed a motion to dismiss, motion for judgment on the pleadings, and plea in abatement, alleging that the National Labor Relations Board had exclusive jurisdiction, precluding the State court's consideration for the reason that plaintiffs were managers of the meat markets in defendant's stores or, in the alternative, plaintiffs as supervisors did not come within the provisions of G.S. 95-78, G.S. 95-81, and G.S. 95-83. Defendants further contend that although the complaint alleged violations as to all four plaintiffs, the damages were alleged collectively without alleging individual damages; and, furthermore, in no event are punitive damages recoverable under G.S. 95-83.

Prior to bringing this action, plaintiffs filed charges with the National Labor Relations Board claiming that the discharges were unlawful under the National Labor Relations Act as amended. The Regional Director of the National Labor Relations Board dismissed the charges for the reason that plaintiffs were supervisors and not employees and, therefore, not entitled to protection of the Act. Plaintiffs appealed the Regional Director's decision, but the appeal was denied by the Board's General Counsel for the same reason.

Ray F. Messick, president of Food Fair of N.C., Inc., and one of the defendants in this action, filed an affidavit stating:

> "Each of the plaintiffs in this action was at the times alleged a manager of the meat market of one of the stores owned and operated by the defendant, Food Fair of N.C., Inc. There is a meat market at each of the corporate defendant stores and the plaintiffs, as meat market managers at their respective

stores, were not responsible to either the store manager or the assistant manager. The meat markets were operated independently and each of the plaintiffs had full supervisory authority over said meat market and the employees in the meat market. Each of the plaintiffs was supervisor of his respective meat market and its employees and had authority to hire, fire or discipline meat market employees, responsibility for directing them and adjusting their grievances by the use of their independent judgment.

"The plaintiffs, as meat market managers, independently and on their own authority scheduled regular hours and overtime hours for meat market employees. Each of the plaintiffs, as meat market managers, exercised their authority to grant time off and to tell meat market employees what to do in their employment in the meat market. Each of the plaintiffs were paid more than other employees, were provided more life insurance by the defendant corporation, got more sick leave and a larger Christmas bonus, as well as a year-end bonus, which the other meat market employees did not receive.

"On June 3, 1971, the Regional Director of the Eleventh Region of the National Labor Relations Board issued an order adjudicating Ulysses Vernon Beasley, James A. Kiger, Emidio J. Bassetti and Joe W. Jones, plaintiffs in this case, as supervisors. This order also included all other meat managers of the defendant corporation."

On 28 February 1972 Gambill, J., entered the following order:

> "THIS CAUSE having been calendared for hearing on the Motion Docket at the February 21, 1972 week of Civil Court in and for Forsyth County, and having come on for hearing before the undersigned Judge of the Superior Court upon the defendants' Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement, and all parties having been represented by counsel at said hearing before the undersigned Judge and having filed briefs and presented arguments for their respective clients and positions in the matter;
>
> "And the Court having considered the Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement; and the parties having stipulated that each of the plaintiffs in this cause was at all times complained of a supervisor of Food Fair of N.C., Inc.; and the defendants having further filed Affidavit of Ray F. Messick, dated February 23, 1972, without objection; and the Court having further considered the Motions filed as a Motion For Summary Judgment as provided under Rule 12(c) and Rule 56;
>
> "And the Court, having heard the matter and the arguments of counsel for all parties in the same, being of the opinion that the defendants' Motion For Judgment On The Pleadings and To Dismiss should be allowed for that the plaintiffs have failed to state a claim

upon which relief can be granted; and the Court being further of the opinion that the defendants are entitled to summary judgment in their favor pursuant to Rule 56 in that the pleadings, stipulation and affidavits show that there is no genuine issue as to any material fact and that the defendants are so entitled to judgment as a matter of law; and the parties having agreed that the Judgment be presented on this date;

"NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendants' Motion For Judgment On The Pleadings and To Dismiss is hereby allowed; that the Court has further considered said Motion as a Motion For Summary Judgment and that the defendants' Motion For Summary Judgment is hereby allowed; that this action be and the same is hereby dismissed with prejudice; and that the costs of the action be taxed against the plaintiffs."

Plaintiffs Beasley, Bassetti, and Jones appealed. The Court of Appeals in an opinion by Judge Morris, concurred in by Judges Vaughn and Graham, reversed. We allowed *certiorari* on 14 September 1972.

McCAUL, GRIGSBY and PEARSALL by ROBERT C. MOSS; HUDSON, PETRKE, STOCKTON, STOCKTON & ROBINSON by R. M. STOCKTON, JR., and JAMES H. KELLY, JR., for defendant appellants.

LARRY L. EUBANKS for plaintiff appellees Beasley, Bassetti, and Jones.

HAYNSWORTH, BALDWIN and MILES by JAMES M. MILES, Attorneys for Associated Industries, Inc., Capital Associated Industries, Inc., Central Piedmont Industries, Inc., Piedmont Associated Industries, Inc., and Western Carolina Industries, Inc., Amici Curiae.

MOORE, Justice.

The first question posed on this appeal is whether the courts of North Carolina have jurisdiction to adjudicate a claim brought by plaintiffs, supervisors, against their employer for damages resulting from an alleged unfair practice under the provisions of our Right-to-Work Law, Chapter 328, Session Laws of 1947, codified as G.S. 95, Sections 78 through 84.

Plaintiffs were discharged from their employment with defendant Food Fair of N.C., Inc., on June 25 and June 27, 1971. Plaintiffs allege that the discharge contravenes G.S. 95-81, which is as follows:

> "No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

Plaintiffs' action for damages is based on G.S. 95-83, which provides:

> "Any person who may be denied employment or be deprived of continuation of his employment in violation of §§95-80, 95-31, and 95-82 or of one or more of such sections, shall

> be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

Our Right-to-Work Law has been upheld by this Court and the Supreme Court of the United States. *State v. Whitaker*, 228 N.C. 352, 45 S.E. 2d 860 (1947); *Lincoln Fed. L. U. v. Northwestern I. & M. Co.*, 335 U.S. 525, 93 L. Ed. 212, 69 S. Ct. 251, 6 A.L.R. 2d 473 (1949); 29 USC §164(b). The determinative question then in this case is: Are supervisors entitled to protection under this Act?

Prior to the institution of this action, plaintiffs filed charges with the National Labor Relations Board claiming that their discharges were unlawful under the National Labor Relations Act as amended. The Regional Director of that Board found that the employer was engaged in commerce within the meaning of the Act and it would effectuate the purpose of the Act to assert jurisdiction, but dismissed the charges after determining that the plaintiffs were supervisors and not employees and were not entitled to protection of the Act. The Board's General Counsel denied plaintiffs' appeal for the same reason. Thereafter the plaintiffs instituted this action.

In *Willard v. Huffman*, 250 N.C. 396, 109 S. E. 2d 233 (1959), this Court upheld a judgment for an employee awarding damages sustained as the result of his discharge by his employer for failure to abstain and refrain from membership in a labor union or labor organization. The *Willard* case is distinguishable from the present case in two

important respects. First, in *Willard* the National Labor Relations Board refused to consider plaintiff's claim, stating: "Further proceedings are not warranted inasmuch as the operations of the employer do not appear to meet the required standards to warrant the Board's exercise of its jurisdiction in this matter." In the present case, the National Labor Relations Board had jurisdiction but refused to grant plaintiffs' relief due to the provisions of 29 USC §164(a), which provides:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, *but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either National or Local, relating to collective bargaining.*" (Emphasis added.)

Secondly, plaintiff in *Willard* was an employee clearly entitled to protection under our Right-to-Work Law, while in the present case plaintiffs were admittedly supervisors.

The National Labor Relations Act as amended distinguishes supervisors from employees. 29 USC §152(3) provides, *inter alia:* "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . . ." 29 USC §152(11) defines the term "supervisor" as: ". . . . (A)ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances. . . ."

Since the 1947 amendments to the National Labor Relations Act, the federal courts have been called upon on numerous occasions to determine the relative rights of employers and supervisors under that statute. The federal courts have consistently held that a supervisor is not protected under the statute from discharge due to union membership or activity. In *N.L.R.B. v. Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966), the Court decided that a "dispatcher" of company trucks and drivers was a supervisor. Based upon that determination, it was held that the plaintiff was not entitled to reinstatement and back pay because of his discharge for union membership and activity. *Accord, N.L.R.B. v. Charley Toppino and Sons, Inc.*, 332 F.2d 85 (5th Cir. 1964). In *Oil City Brass Works v. N.L.R.B.*, 357 F.2d 466 (5th Cir. 1966), the same Court said:

> "If Hammock was fired solely because of his union affiliation, there has been no unfair labor practice on which the Board can predicate its order. The National Labor Relations Act does not protect supervisory personnel. [Citations omitted.] It is settled that the Act does not preclude a company from firing or refusing to recall from layoff status a supervisory employee solely because that employee is affiliated with a union. [Citations omitted.]"

The Ninth Circuit Court of Appeals reached the same conclusion in *N.L.R.B. v. Fullerton Publishing Company*, 203 F.2d 545 (9th Cir. 1960). In that case the county news editor of a newspaper was deemed to be a supervisor. The Court then said:

> "The law is clear that a supervisor is not entitled to the protection afforded ordinary

> employees under the National Labor Relations Act, and as to supervisors there can be no such thing as a discriminatory discharge or unfair labor practice . . . ."

Accord, N.L.R.B. v. Inter-City Advertising Co., 190 F.2d 420 (4th Cir. 1951), cert. den., 342 U.S. 908, 96 L. Ed. 679, 72 S. Ct. 301 (1952); *N.L.R.B. v. Griggs Equipment, Inc.*, 307 F.2d 273 (5th Cir. 1962).

The federal cases go further than merely holding that the National Labor Relations Act affords supervisory personnel no protection. These cases recognize the existence of the legislative intent on the part of Congress to leave employers unfettered in dealing with union affiliation on the part of their supervisory personnel. *N.L.R.B. v. Edward G. Budd Mfg. Co.*, 169 F.2d 571 (6th Cir. 1948), cert. den., 335 U.S. 908, 93 L. Ed. 441, 69 S. Ct. 411 (1949), was one of the first cases dealing with supervisors decided after the 1947 amendments to the National Labor Relations Act. There the Court discussed the intent of Congress in enacting the amendments:

> "We believe it is clear that Congress intended by the enactment of the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. . . ."

Congressional intent was also considered at length by Circuit Judge Pope in *N.L.R.B. v. Retail Clerks Inter. Ass'n*, 211 F.2d 759 (9th Cir. 1954):

> "A primary objective of §2(11) of the Act, to which reference is made in this paragraph

> of the decree, was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear. The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act. Much emphasis was laid upon the desirability of assuring their independence of unions of the rank-and-file. It was noted that what had been happening in respect to unionizing of foremen under the former Act was 'bad for output' and hurt the free flow of commerce which the Act was intended to promote . . . ."

Similarly, in *Carpenters District Council, Etc. v. N.L.R.B.*, 274 F.2d 564 (D.C. Cir. 1959), that Court said:

> " . . . Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations. . . ."

"When a union attempts to organize supervisors, or when supervisors elect to become members of a union, a problem of federal preemption does arise." 4 Jenkins, Labor Law §21.9, The Federal Preemption Doctrine, p. 103. In *San Diego Unions v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959), Mr. Justice Frankfurter, speaking for the majority, laid down certain guidelines when he said:

> ". . . If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7 [29 USC §157] or prohibited by §8 [29 USC §158], then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States...." 359 U.S. at p. 245.

In *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L. Ed. 2d 254, 86 S. Ct. 327 (1965), in an opinion by Mr. Justice Harlan, expressing the view of eight members of the Court, it was held that under the circumstances of that case, the federal Act did not preempt the State's jurisdiction. Plaintiffs, employers, declined to negotiate with a union representing the marine engineers until it was established that the union represented a majority of the engineers, whereupon the union picketed plaintiffs' ships. Employers petitioned that a representation election among its engineers be held. The petition was dismissed by the National Labor Relations Board on the ground that the engineers were "supervisors" under the Act and excluded from the definition of employees. The employers' charge, alleging a violation of Section 8 (29 USC §158) of the Act,

was dismissed on the ground that the union's conduct fell outside the provisions of the Act because it sought to represent "supervisors" rather than "employees." Plaintiffs then brought suit in Wisconsin state court seeking injunctive relief. The state court dismissed for lack of jurisdiction. The Supreme Court of Wisconsin affirmed on the ground that the picketing, while illegal under Wisconsin law, arguably violated Sections 8(b)(4)(B) and 8(b)(7) of the Act (29 USC §153(b)(4)(B) and 29 USC §158(b)(7)) and so fell within the exclusive jurisdiction of the National Labor Relations Board. In reversing, the Supreme Court said:

> "The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by §7, or prohibited by §8' of the National Labor Relations Act, see 359 US, at 244-246, and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against State regulation, cf. 359 US, at 245."

Thus, after reaffirming the "arguably" test as set out in *Garmon*, *Hanna* recognized an additional aspect of the *Garmon* rule: "(L)egislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation." The Court then determined that because the picketers in *Hanna* were supervisors, their activity was not arguably protected or prohibited by Sections 7 and 8. The union argued, however, that Section 14(a) indicated that Congress had affirmatively adopted a *laissez faire* attitude toward supervisors which brought the case within the second aspect of

the *Garmon* rule and precluded both federal and state regulation. In answering this contention Mr. Justice Harlan said:

> "This broad argument fails utterly in light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the legislators fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted §8(b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing. . . ."

The Wisconsin law increased the restrictions on supervisor organizing and so was consistent with the national labor relations policy concerning supervisors. *Hanna*, however, specifically recognizes a national policy established by Congress "to relieve employers from any compulsion under the Act and under state law to coutenance or bargain with any union of supervisory employees." The plaintiffs contend that the North Carolina Right-to-Work Law protects supervisors from discharge based solely upon union membership. If the North Carolina Right-to-Work Law, in fact, does this, the additional burden on employers and the added protection for supervisors would run counter to the legislative intent assigned to Congress by both Mr. Justice Harlan in *Hanna* and the many Circuit Court of Appeals cases herein cited. Preservation of the integrity of a national policy in the field of labor-management relations

is the purpose of the doctrine of federal preemption in this context.

Further insight into the application of the preemption doctrine in situations which do not fall within the "arguably" test of *Garmon* may be found in an analysis of *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L. Ed. 2d 280, 84 S. Ct. 1253 (1964). In that case Morton was engaged in hiring out trucks and drivers for use in highway construction. Local 20 represented Morton's employees. During a strike over the terms of a new collective bargaining agreement, Local 20 sought to exert upon Morton various forms of secondary pressure which violated Section 8(b)(4) of the National Labor Relations Act. Local 20 also persuaded the management of one of Morton's customers to refrain from doing business with Morton during the strike. Since the customer was not threatened with any form of reprisal, the persuasion to boycott Morton was not even arguably an unfair labor practice. Local 20 was, likewise, not protected in this activity by the National Labor Relations Act. A persuasive boycott, however, violated Ohio law and the state courts granted compensatory and punitive damages. The United States Supreme Court acknowledged that the union's activity did not bring the case within the *Garmon* rule:

> "It is the respondent's contention, however, that since the petitioner union's peaceful conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the National Labor Relations Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this conduct. But even though it may be assumed that at least some of the

> secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303, 'Congress occupied this field and closed it to state regulation.' *Automobile Workers v. O'Brien*, 339 U.S. 454, 457. The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102. . . ."

The Court then determined that a persuasive boycott was precluded from state regulation by the preemption doctrine. The Court said:

> " . . . This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761 v. Labor Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted §303 [8(b)(4)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to

> be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner v. Teamsters Union*, 346 U.S. 485, 500. . . ."

To permit a state law to deprive an employer of his right to discharge his supervisor for membership in a union would completely frustrate the congressional determination to leave this weapon of self-help to the employer. Furthermore, the balance of power between labor and management expressed in our national labor policy would be upset. *Oil City Brass Works v. N.L.R.B., supra; N.L.R.B. v. Fullerton Publishing Co., supra; Carpenters District Council, Etc. v. N.L.R.B., supra.* See 85 Harv. L. Rev. 1337, 1351, *Labor Law Preemption Revisited.*

Congress and the federal courts have adopted a national industrial relations policy which gives an employer the right to discharge his supervisor for union membership. The state is precluded from interfering with that policy. "When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the states from acting." *San Diego Unions v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959). "Incompatible doctrines of local law must give way to principles of federal labor law." *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 7 L. Ed. 2d 593, 82 S. Ct. 571 (1961).

The North Carolina Right-to-Work Law defines certain rights of employers and employees. See *State v. Whitaker, supra; Lincoln Fed. L. U. v. Northwestern I. & M. Co., supra.* However, this state law cannot be construed to

contravene the national policy as between employer and supervisor. When, as in the present case, the facts disclose that plaintiffs as supervisors seek to invoke a remedy precluded by the established national policy, the doctrine of federal preemption applies, and the state court is without jurisdiction over the subject matter of the controversy. For this reason, it is not necessary to consider the other questions raised by the pleadings in this case or discussed in the opinion of the Court of Appeals.

The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals with direction that it remand the case to the Superior Court of Forsyth for entry of judgment affirming the order of Judge Gambill dismissing the action.

Reversed and Remanded.

NORTH CAROLINA RIGHT-TO-WORK LAW

N.C.G.S. Section 95-78. Declaration of public policy. – The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association.

Section 95-79. Certain agreements declared illegal. – Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.

Section 95-80. Membership in labor organization as condition of employment prohibited. – No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

Section 95-81. Nonmembership as condition of employment prohibited. – No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

Section 95-82. Payment of dues as condition of employment prohibited. – No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees, or other charges of any kind to any labor union or labor organization.

Section 95-83. Recovery of damages by persons denied employment. – Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 95-80, 95-81, and 95-82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment.

Section 95-84. Application of article. – The provisions of this article shall not apply to any lawful contract in force on the effective date hereof but they shall apply in all respects to contracts entered into thereafter and to any renewal or extension of any existing contract.

LABOR-MANAGEMENT RELATIONS ACT

29 U.S.C. Section 164(a). Supervisory employees' rights to organize – Membership as condition of employment – Local law applicable – Declination of jurisdiction by board. – Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act (Sections 151-158, 159-168 of this title) shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

...H CAROLINA
County of Forsyth

File #
In The General C... Court Div...

...
...
...
FORD FAIR OF N. C., INC., and

SUPERIOR

CIVIL SUMMONS

...H CAROLINA

To each of the defendants named below—GREETING:

Defendant	Address
Ray F. Messick	2900 Lowery Street

YOU ARE HEREBY SUMMONED AND NOTIFIED to appear ... Forsyth County within 30 days after service of this Summons upon you, exclusive of the day of such service, and defend the above entitled action as follows: a written Answer to the Complaint must be served upon the plaintiff or his attorney within THIRTY DAYS after the service of this Summons and a copy thereof must be filed at the office of the undersigned clerk. If you fail to do so, the plaintiff will apply to the court for the relief demanded in the Complaint.

Issued at 3:42 o'clock P.M., this 14 day of October, 1971.

...Attorney
Address
817 NCNB Building
...
Telephone: (919) 723-0741

Deputy/Assistant/Clerk of Superior Court

RETURN OF SERVICE

I certify that this Summons was received on the ____ day of _____, 19___, and together with the Complaint was served as follows:

On _____ on the ____ day of October, 19 71, at the following place: _____ By:
Ray F. Messick (Fill in address where copy was delivered or left) 71

☐ delivering copies to him personally. ☐ leaving copies with _____ who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

On _____ on the ____ day of _____, 19___, at the following place: _____ By:
(Fill in address where copy was delivered or left)

☐ delivering copies to him personally. ☐ leaving copies with _____ who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

If not served on defendant, state reason and give his name: _____

Fee $ _____ _____ Sheriff of _____ County, N. C.
Paid _____ By: _____ Deputy
By _____ Date _____

G.S. 1A-1, Rule 4
AOC-L Form 49
Rev 8/70

STATE OF NORTH CAROLINA
County of Forsyth

File # 71-CVS-5060
In The General Court of Justice
Court Division
SUPERIOR

[redacted]
Against
[redacted]

CIVIL SUMMONS

To each of the defendants named below---GREETING:

Defendant	Address
Pond Fair of N. C., Inc.	Make service upon Ray F. Monteith, President

YOU ARE HEREBY SUMMONED AND NOTIFIED to appear [redacted] above entitled civil action as follows: a written Answer to the Complaint [redacted] or his attorney within THIRTY DAYS after the service of this Summons and a copy thereof must be filed at the office of the undersigned clerk. If you fail to do so, the plaintiff will apply to the court for the relief demanded in the Complaint.

Issued at 3:42 o'clock P.M., this 14 day of October, 1971.

[redacted] Attorney
Address
[redacted]
Telephone: (919) 723-0741

Deputy/Assistant/Clerk of Superior Court

RETURN OF SERVICE

I certify that this Summons was received on the ____ day of _____, 19__, and together with the Complaint was served as follows:

On _____ on the ____ day of October, 19 71, at the following place: Pond Fair of N. C., Inc. By: _____
by serving Ray F. Monteith, President (fill in address where copy was delivered or left) 72

☐ delivering copies to him personally. ☐ leaving copies with _____ who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

On _____ on the ____ day of _____, 19__, at the following place: _____ By: _____
(fill in address where copy was delivered or left)

☐ delivering copies to him personally. ☐ leaving copies with _____ who is a person of suitable age and discretion and who resides in the defendant's dwelling house or usual place of abode.

If not served on defendant, state reason and give his name: _____

Fee $ _____ _____ Sheriff of _____ County, N. C.
Paid _____ By: _____ Deputy
By _____ Date _____

G.S. 1A-1, Rule 4
AOC-L Form 49
Rev 8/70

[Filed]

COMPLAINT

COMES NOW the Plaintiffs, and complaining of the Defendants, says and alleges:

I.

That the Plaintiffs are residents of the State of North Carolina and were residents of this State at all times material herein.

II.

The Defendant Food Fair of N.C., Inc., is a North Carolina corporation operating at all times material herein a number of grocery stores in Forsyth County, North Carolina.

III.

That Defendant Ray F. Messick is a resident of Winston-Salem, North Carolina and is an officer and director of the above-mentioned corporate defendant.

IV.

That each of the Plaintiff's were employed by the Defendant Food Fair for at least 10 years prior to June 25, 1971 in its Winston-Salem, North Carolina stores, and at all times material herein, had contracts of employment with said Defendant whereby Plaintiffs were to serve Defendants as meat market managers for a weekly wage.

V.

That in April, 1971, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, instituted an organizing campaign among Defendant Food Fair's meat department employees, and following a National Labor

Relations Board election on June 24, 1971, said labor organization was certified as collective bargaining representative for all of said Defendants' meat market employees.

VI.

That Plaintiffs joined said labor organization in April and May, 1971 and that Defendants Food Fair and Messick had knowledge of this prior to June 24, 1971.

VII.

That on June 25 and 27, 1971, Defendant Messick, acting individually and as agent for Defendant Food Fair of N.C., Inc., discharged the Plaintiffs because of their membership in said labor organization, all in violation of the laws and General Statutes of the State of North Carolina.

VIII.

That as a direct and proximate result of the Defendants' conduct, Plaintiffs have been embarrassed and humiliated in their community, have lost all means of income for the support of themselves and their families, have been unable to find other employment, and have been otherwise permanently damaged in the amount of $500,000.00.

IX.

That the conduct complained of was willful, reckless, malicious, and without the slightest regard for the rights guaranteed the Plaintiffs by the General Statutes of North Carolina, and therefore, Plaintiffs are entitled to punitive and smart money damages in the amount of $1,000,000.00.

WHEREFORE, Plaintiffs pray for the following relief:

(a) That they have and recover of the Defendants the sum of $500,000.00 actual damages.

(b) That they have and recover of the Defendants the sum of $1,000,000.00 in punitive damages.

(c) That Defendants be taxed with the costs of this action; and

(d) For such other and further relief as to the Court seems just and proper.

EUBANKS AND SPARROW

/s/ Larry L. Eubanks
Larry L. Eubanks
Attorney for Plaintiffs
417 NCNB Building
Winston-Salem, North Carolina
27101
Telephone: (919) 723-0741

[Filed December 14, 1971]

MOTION TO DISMISS, MOTION FOR JUDGMENT ON THE PLEADINGS, and PLEA IN ABATEMENT

NOW COMES the defendant Food Fair of N.C., Inc., pursuant to Rule 12 of the North Carolina Rules of Civil Procedure, and respectfully moves the Court as follows:

I. *To dismiss the action* for failure to state a claim upon which relief can be granted by this Court, and for want of jurisdiction over the subject matter. In support of this Motion, the defendant respectfully shows the Court:

(a) The National Labor Relations Board has exclusive jurisdiction over the subject matter of this action.

(b) On June 28, 1971, plaintiffs filed a charge with the National Labor Relations Board alleging unfair labor practice in violation of Section 7 and Section 8(a)(1) and (3) of the Labor Management Relations Act (29 U.S.C. 7, 151 *et seq.), N.L.R.B. 11-CA-4622,* a copy of which is attached hereto as Exhibit 1 to this Motion and incorporated herein as if fully set forth in this paragraph.

(c) The same subject matter is alleged in the Complaint in the present action.

(d) The National Labor Relations Board is empowered to award a remedy not less than that authorized by North Carolina General Statute 95-83.

(e) This charge is pending before the National Labor Relations Board which has exclusive jurisdiction over unfair labor practices brought before it. (See *Douglas Aircraft v. Local Union 379,* IBEW 247 N.C. 620; 101 S.E. 2d 800, at page 806).

(f) The aforesaid charges brought before the National Labor Relations Board are still pending by virtue of an appeal taken by the present plaintiffs from a decision of the Regional Director, a copy of which appeal is attached hereto as Exhibit 2 and incorporated herein as if fully set forth in this paragraph.

II. *To dismiss the action* on the ground that the plaintiffs have already been adjudicated not to be employees by the National Labor Relations Board, and, therefore, do not come within the purview of North Carolina General Statute 95-78 *et seq.*, upon which the present action is based. In support of said Motion, the defendants respectfully show the Court:

(a) Plaintiffs were adjudicated to be supervisors within the meaning of the Labor Relations Act (29 U.S.C. 7,

sections 2(3) and 2(11), by the National Labor Relations Board by Order dated June 3, 1971, a copy of which Order is attached hereto as Exhibit 3 and incorporated herein as if fully set forth; and as supervisors, they are management personnel and not subject to the provisions of General Statute 95-78 *et seq.*

III. *By way of Plea in Abatement*, the defendants respectfully show the Court:

(a) The aforesaid charges pending before the National Labor Relations Board were instituted prior to the present action, and involved the same parties and subject matter of the present action. The defendants respectfully submit that the plaintiffs are not entitled to maintain the present action by virtue of the aforesaid prior action, which is still pending.

IV. *To dismiss the action* for misjoinder of claims and for failure to state claim upon which relief can be granted, and in support of said Motion, defendant respectfully shows the Court:

(a) The Complaint alleges violations as to all four plaintiffs, but alleges damages collectively, and does not define or allege what damages were suffered by each plaintiff individually, making it impossible for defendant to defend against the claims of the individual plaintiffs.

VI. *In the alternative*, the defendant moves to dismiss and for judgment on the pleadings as to Paragraph IX of the Complaint and subparagraph (b) of the prayer for relief pertaining to punitive damages, on the ground that such punitive damages are not recoverable in this action as a matter of law. See C.S. 95-83.

WHEREFORE, the defendant Food Fair of N.C., Inc. respectfully prays the Court that the plaintiffs' motion be dismissed; and, in the alternative, if the entire Motion is not allowed, that that portion of the Complaint seeking to recover punitive damages be stricken and dismissed.

This the 14th day of December, 1971.

McCAUL, GRIGSBY and PEARSALL

/s/ By Robert G. Moss
Robert G. Moss

HUDSON, PETRKE, STOCKTON, STOCKTON & ROBINSON

/s/ By R. M. Stockton, Jr.
R. M. Stockton, Jr.

Attorneys for Defendants

[Certificate of Service, dated December 14, 1971]

[Dated February 23, 1972]

AFFIDAVIT

RAY F. MESSICK, being duly sworn, deposes and says:

I am President of Food Fair of N.C., Inc., one of the defendants in this action. I am the President and chief operating officer of this defendant corporation.

Each of the plaintiffs in this action was at the times alleged a manager of the meat market of one of the stores owned and operated by the defendant, Food Fair of N.C., Inc. There is a meat market at each of the corporate

defendant stores and the plaintiffs, as meat market managers at their respective stores, were not responsible to either the store manager or the assistant manager. The meat markets were operated independently and each of the plaintiffs had full supervisory authority over said meat market and the employees in the meat market. Each of the plaintiffs was supervisor of his respective meat market and its employees and had authority to hire, fire or discipline meat market employees, responsibility for directing them and adjusting their grievances by the use of their independent judgment.

The plaintiffs, as meat market managers, independently and on their own authority scheduled regular hours and overtime hours for meat market employees. Each of the plaintiffs, as meat market managers, exercised their authority to grant time off and to tell meat market employees what to do in their employment in the meat market. Each of the plaintiffs were paid more than other employees, were provided more life insurance by the defendant corportion, got more sick leave and a larger Christmas bonus, as well as a year-end bonus, which the other meat market employees did not receive.

On June 3, 1971, the Regional Director of the Eleventh Region of the National Labor Relations Board issued an order adjudicating Ulysses Vernon Beasley, James A. Kiger, Emidio J. Bassetti and Joe W. Jones, plaintiffs in this case, as supervisors. This order also included all other meat managers of the defendant corporation.

There is attached to this affidavit a true copy of the decision of the NLRB.

/s/ Ray F. Messick
Ray F. Messick

[Notarization]

December 30, 1971

Larry L. Eubanks, Esq.
417 North Carolina Nat'l Bank Bldg.
Winston-Salem, North Carolina 27101

Re: Food Fair of North Carolina, Inc., 11-CA-4622

Dear Mr. Eubanks:

Your appeal in the above matter has been duly considered.

The appeal is denied. The four alleged discriminatees involved herein were supervisors within the meaning of Section 2(11) of the Act and hence were not entitlted, in the circumstances herein, to the protection of the act.

Very truly yours,
Peter G. Nash
General Counsel

By: /s/ IRVING HERMAN
Director, Office of Appeals

Copies of the letter were received by Ray F. Messick, President of Food Fair of N.C., Inc., Robert C. Moss, Esq., his attorney and others.

A. 31

Supreme Court of the United States

No. A-1073 , ~~October Term, 19~~

ULYSSES VERNON BEASLEY, ET AL

Petitioners

v/

FOOD FAIR OF NORTH CAROLINA, INC. ET AL

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

May 27, 19 73

s/Warren E. Burger

Chief Justice of the United States.

Dated this 26

day of April, 19 73

[Issued February 28, 1972]

ORDER and JUDGMENT

THIS CAUSE having been calendared for hearing on the Motion Docket at the February 21, 1972 week of Civil Court in and for Forsyth County, and having come on for hearing before the undersigned Judge of the Superior Court upon the defendants' Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement, and all parties having been represented by counsel at said hearing before the undersigned Judge and having filed briefs and presented arguments for their respective clients and positions in the matter;

And the Court having considered the Motion To Dismiss, Motion For Judgment On The Pleadings, and Plea In Abatement; and the parties having stipulated that each of the plaintiffs in this cause was at all times complained of a supervisor of Food Fair of N.C., Inc.; and the defendants having further filed Affidavit of Ray F. Messick, dated February 23, 1972, without objection; and the Court having further considered the Motions filed as a Motion For Summary Judgment as provided under Rule 12(c) and Rule 56;

And the Court, having heard the matter and the arguments of counsel for all parties in the same, being of the opinion that the defendants' Motion For Judgment On The Pleadings and To Dismiss should be allowed for that the plaintiffs have failed to state a claim upon which relief can be granted; and the Court being further of the opinion that the defendants are entitled to summary judgment in their favor pursuant to Rule 56 in that the pleadings, stipulation and affidavits show that there is no genuine issue as to any material fact and that the defendants are so

entitled to judgment as a matter of law; and the parties having agreed that the Judgment be presented on this date;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the defendants' Motion for Judgment On The Pleadings and To Dismiss is hereby allowed; that the Court has further considered said Motion as a Motion For Summary Judgment and that the defendants' Motion For Summary Judgment is hereby allowed; that this action be and the same is hereby dismissed with prejudice; and that the costs of the action be taxed against the plaintiffs.

This the day of February, 1972.

Judge Presiding

[Issued February 28, 1972]

APPEAL ENTRIES

To the entry of the foregoing Judgment dated February 28, 1972, and for errors assigned and to be assigned, defendant in apt time objects, excepts and gives Notice of Appeal in Open Court. Further notice is waived. Appeal bond in the sum of $100.00 is adjudged sufficient. Plaintiff is hereby allowed 30 days to serve statement of case on appeal upon defendant; And defendant is hereby allowed 20 days thereafter to serve a countercase or exception.

This the 28th day of February, 1972.

/s/ Robert M. Gambill
Robert M. Gambill, Judge Presiding

[Dated]

ASSIGNMENT OF ERROR

The Trial Judge erred in dismissing plaintiffs action because they have been discharged from employment because of Membership in a labor organization and therefore are entitled to the protection of North Carolina General Statutes 95-78 *et seq.*

This is plaintiffs sole assignment of error which is their exception located at R.p. _____.

_____

W. Warren Sparrow, *Attorney for Plaintiffs*

Of Counsel:

EUBANKS AND SPARROW
417 NCNB Building
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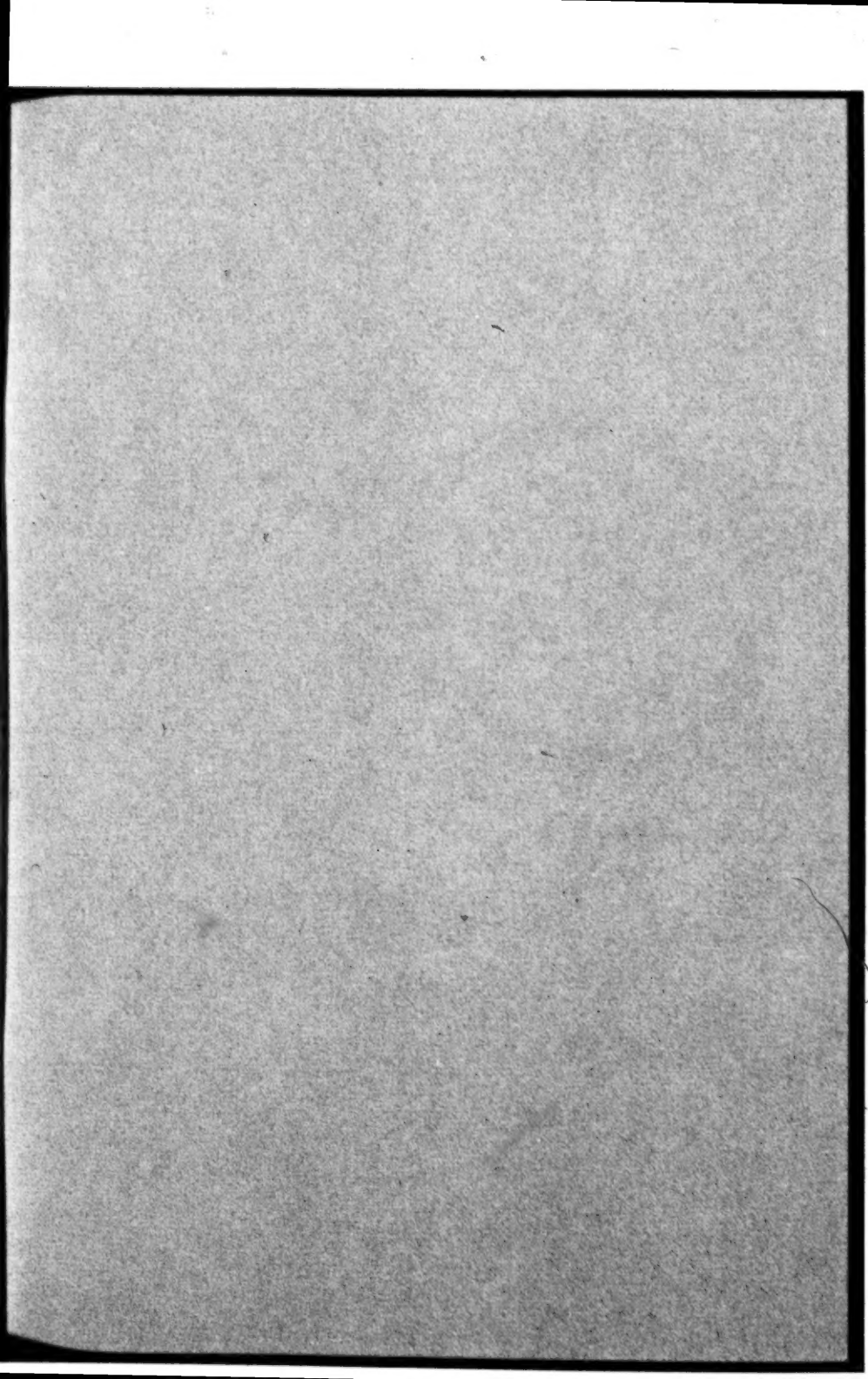

SUPREME COURT, U. S.

MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI and
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OR NORTH CAROLINA, INC.
and RAY F. MESSICK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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ULYSSES VERNON BEASLEY,
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v.

FOOD FAIR OR NORTH CAROLINA, INC.
and RAY F. MESSICK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

At the February 28, 1972, Session of the Forsyth County Superior Court, the Honorable Judge Robert M. Gambill entered summary judgment for the defendants Food Fair of North Carolina, Inc. and Ray F. Messick. The Court of Appeals of the State of North Carolina, as reported at 15 N.C. App. 323, 190 S.E.2d 33 (1972), reversed the decision of the Honorable Judge Robert M. Gambill. The Supreme Court of the State of North

Carolina, as reported at 282 N.C. 530, 193 S.E.2d 911 (1973), reversed the decision of the Court of Appeals of the State of North Carolina and ordered that judgment be entered affirming the decision of the Honorable Judge Robert M. Gambill.

QUESTIONS PRESENTED

Do the Courts of the State of North Carolina have jurisdiction to adjudicate a claim brought by supervisors against their employer for damages resulting from an alleged unfair labor practice under the provisions of Sections 95-78 through 95-84 of the North Carolina General Statutes?

STATEMENT OF CASE

The petitioners herein were meat market managers for the respondent, Food Fair of North Carolina, Inc., who were discharged allegedly because they actively supported a union in its attempt to organize the company's rank and file employees. The petitioners filed charges with the National Labor Relations Board, claiming that their discharges were unlawful under the National Labor Relations Act, as amended. The Regional Director of the Board dismissed the charges because of "insufficient evidence of violation." He also determined that petitioners were supervisors and not "employees" and therefore not entitled to the protection under the Act. The petitioners appealed the Regional Director's decision, but this appeal was denied by the Board's General Council on the grounds that, as managers, they were supervisors within the meaning of the Act, and therefore not protected by that Act (Appendix, p. A30). The petitioners then filed this action in the Forsyth County Superior Court of the State of North Carolina, alleging that they were unlaw-

fully discharged because of their active support of and membership in the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, in violation of Section 95-81 of the North Carolina General Statutes. The petitioners further requested monetary damages under Section 95-83 of the North Carolina General Statutes. The respondents then filed a motion to dismiss and motion for judgment on the pleadings, alleging, among other things, that supervisors were not included in the protection of the relevant state statutes, and that the Board had exclusive jurisdiction, thereby precluding the state court's consideration under North Carolina law of the facts and circumstances of this case.

The cause was heard before the Honorable Judge Robert M. Gambill during the February 21, 1972, Session of Civil Superior Court in Forsyth County, North Carolina. During the hearing all parties stipulated that each of the petitioners was, at all times complained of, a "supervisor" of Food Fair of North Carolina, Inc., and the trial court entered summary judgment for the respondents on February 28, 1972. Thus, the complete facts and circumstances of this case have not been fully developed through trial or other means.

The Court of Appeals of the State of North Carolina reversed the trial court and held that state courts were not preempted from regulating conduct between employers and supervisors.

The respondents then petitioned for a Writ of Certiorari to the North Carolina Court of Appeals for review of its decision, and on September 14, 1972, that Petition was allowed.

The Supreme Court of North Carolina reversed the ruling of the Court of Appeals, holding that because the petitioners sought to invoke a remedy inconsistent with national labor policy, North Carolina state courts were

precluded under the federal preemption doctrine from asserting subject matter jurisdiction over the case. The Supreme Court of North Carolina did not reach the issue of whether or not the petitioners, as supervisory personnel, came within the provisions of Sections 95-78, 95-81 and 95-83 of the North Carolina General Statutes and that issue has as yet not finally been determined by the North Carolina Supreme Court.

The petitioners then petitioned the Supreme Court of the United States for Writ of Certiorari to the Supreme Court of North Carolina.

REASONS FOR DENYING WRIT

Prior case law has clearly established that a state has neither the jurisdiction nor the authority to regulate conduct between labor and management where such conduct is protected by Section 7 (29 U.S.C.A. 157), or prohibited by Section 8 (29 U.S.C.A. 158) of the National Labor Relations Act, as amended. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). This Court has also clearly decided that whether a particular activity is protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act, as amended, must be left in the first instance to the National Labor Relations Board, at least in those instances where the question has not been clearly determined otherwise. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed. 775, 79 S.Ct. 773 (1959); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965).

In the present case the petitioners did file charges with the National Labor Relations Board, which charges were

dismissed because of insufficient evidence of violation and because the petitioners were supervisors and not employees, and therefore were not entitled to the protection of the National Labor Relations Act. A subsequent appeal to the Board's General Council, was also denied on the grounds that the petitioners were supervisors within the meaning of the Act, and therefore did not come within the protection of the National Labor Relations Act (See letter of NLRB General Council, Appendix p. A30).

Although the present case does not come within the bounds of the more established "arguably" test utilized by the United States Supreme Court in *San Diego Unions v. Garmon*, supra, this Court further recognized an additional area not open to state jurisdiction. Thus, in *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965), this Court stated the following guidelines:

> The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by §7, or prohibited by §8' of the National Labor Relations Act, see 359 U.S., at 244-246, *and the legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against State regulation*, cf. 359 U.S., at 245. (Emphasis added)

This second area of activity, that is that activity neither protected nor prohibited which legislative purpose dictated be privileged against state regulation, is clearly the area within which this case lies. The legislative purpose, as revealed by the legislative history surrounding the 1947 amendments to the National Labor Relations Act, clearly reveals that Congress did intend to relieve

employers from any compulsion under the Act and under state law to bargain with or be restricted in their dealings with supervisors or a union of supervisors. In the House Report No. 245, 80th Congress, 1st Session, beginning at page 14, the following remarks clearly indicate Congress' purpose:

> "The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file boss them. The evidence shows that rank and file unions have done much of the actual organizing of foremen, even when the foremen's union professes to be 'independent'. Without any questions, this is why the unions seek to organize the foremen." *Id.* at 14.
>
> * * * * *
>
> "MANAGEMENT, LIKE LABOR, MUST HAVE FAITHFUL AGENTS.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or

control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations." *Id.* at 16.

* * * * *

"So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an 'employer', not an 'employee', any person 'acting in the interest of the employer'; what it again made clear in taking up H.R. 2239 in 1943 and in dropping it when the Board decided the MARYLAND DRYDOCK case, and what, for a third time, it made clear last year in passing the CASE bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of this bill.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom for any reason, he does not trust.

"If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then CONGRESS MUST EXCLUDE FOREMEN FROM THE OPERATION OF THE LABOR ACT, NOT ONLY WHEN THEY

ORGANIZE INTO UNIONS OF THE RANK AND FILE AND INTO UNIONS AFFILIATED WITH THOSE OF THE RANK AND FILE, BUT ALSO WHEN THEY ORGANIZE INTO UNIONS THAT CLAIM TO BE INDEPENDENT OF THE UNIONS OF THE RANK AND FILE." *Id.* at 15. (Emphasis in original.)

* * * * *

"As under the present Act, the power of the Board under the amended Act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision . . . to give to the States a concurrent jurisdiction in respect to closed-shop and other union security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. IT CAN READILY BE SEEN WHAT MISCHIEF MIGHT BE WROUGHT IF, FOR EXAMPLE, FOREMEN SHOULD BE SUBJECT TO STATE LAW AT THE SAME TIME THAT THE WORKERS THEY SUPERVISE ARE SUBJECT TO NATIONAL LAW. MOREOVER, THE BILL HEREWITH REPORTED VERY DEFINITELY STATES A NATIONAL POLICY IN RESPECT TO ORGANIZATION AND COLLECTIVE BARGAINING BY FOREMEN." House Report No. 245, 80th Congress, p. 40. (Emphasis added.)

The same theme is found in the Senate Committee Reports on the 1947 Taft-Hartley Amendment, and in particular Senate Report No. 105, 80th Congress, 1st Session, page 5:

"In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer

> from recognizing a union of foremen. It merely relieves employers who are subject to the national Act free from any compulsion by this National Board OR ANY LOCAL AGENCY to accord to the front line of management the anomalous status of employees." *Id.* at 5. (Emphasis added.)

Since the 1947 amendments to the Act, the federal courts have consistently held that a supervisor is not protected under the Act from discharge due to union membership or activity. *NLRB v. Inter-City Advertising Company*, 190 F.2d 420 (4th Cir. 1951), *cert. den.*, 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 301 (1952); *NLRB v. Fullerton Publishing Company*, 203 F.2d 545 (9th Cir. 1960); *NLRB v. Big Three Welding Equipment Company*, 359 F.2d 77 (5th Cir. 1966).

As noted by the Supreme Court of North Carolina in its decision in this case (Appendix, p. A10), the federal courts have gone further than simply holding that the National Labor Relations Act does not afford supervisory personnel protection. These courts have also clearly recognized the existence of the legislative purpose on the part of Congress to leave employers unfettered in dealing with union affiliation on the part of their supervisory personnel. Thus in the case of *NLRB v. Edward G. Budd Mfg. Company*, 169 F.2d 571 (6th Cir. 1948), *cert. den.*, 335 U.S. 908, 93 L.Ed. 441, 69 S.Ct. 401 (1949), one of the first cases concerning supervisors after the 1947 amendments to the National Labor Relations Act, congressional intent was emphasized as follows:

> "We believe that it is clear that Congress intended by the enactment on the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. . . . " 169 F.2d at p. 579.

Similarly, in *NLRB v. Retail Clerks Inter. Ass'n.*, 211 F.2d 759 (9th Cir. 1954) the legislative purpose was discussed at length, as follows:

> "A primary objective of §2(11) of the Act, to which reference is made in this paragraph of the decree, was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear. The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act." 211 F.2d, at page 763.

Further, congressional intent was also considered in the case of *Carpenters District Council, etc. v. NLRB*, 274 F.2d 564 (D.C. Cir. 1959) as evidenced by the following excerpt:

> "... Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations ..." 274 F.2d, at page 566.

The national labor policy obviously intended by the legislature and expressed by the courts of allowing employers relative freedom in dealing with supervisory personnel in order to insure their loyalty, is obviously only a part of the balance of protection, prohibition, and

laissez faire with respect to union organization, collective bargaining, and labor disputes struck by Congress in the framework provided for in the National Labor Relations Act and the Labor Management Relations Act.

In the case of *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L.Ed. 2d 280, 84 S.Ct. 1253 (1964), the United States Supreme Court was faced with the question of whether or not a state was preempted from regulating labor management relations where those regulations would upset the congressional balance of protection, prohibition, and laissez faire, even though the activities to be regulated are neither protected nor prohibited by Sections 7 and 8 of the National Labor Relations Act. In that case Morton was engaged in hiring out trucks and drivers for use in highway construction, and Local 20 represented Morton's employees. During a strike over the terms of a new collective bargaining agreement, Local 20 persuaded the management of one of Morton's customers to refrain from doing business with Morton during the strike. Since the customer was not threatened with any form of reprisal, the persuasion to boycott Morton was not an unfair labor practice, and Local 20 appears to have agreed that it was not protected by Section 7 of the National Labor Relations Act. However, the persuasion of customers was a violation of Ohio law, and an inferior federal court awarded damages for that violation. In reversing the decision of the lower federal court, the Supreme Court of the United States acknowledged that the activity was neither protected nor prohibited, but was nonetheless inimical to the national labor policy:

> "It is the respondent's contention, however, that since the petitioner union's peaceful conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the National Labor Relations Act, as amended, the trial court was free to

award damages on the basis of state law for injuries caused by this conduct. But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303, 'Congress occupied this field and closed it to state regulation.' *Automobile Workers v. O'Brien*, 339 U.S. 454, 457, 94 l Ed. 978, 983, 70 S.Ct. 781. The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102 7 L.Ed. 2d 593, 598, 82 S.Ct. 571. *The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation."* (Italics supplied) 377 U.S., at 258.

and further,

"This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761 v. Local Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [8(b)(4)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of legal policy as if the state

were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner v. Teamsters Union*, 346 U.S. 485, 500. 377 U.S., at 259, 260.

The present case is indeed an even easier one than that of *Teamsters Local 20 v. Morton, supra*, in that the issue presented in the case at bar is one in which Congress has clearly evidenced its intent, as previously discussed. The relevant North Carolina statute is a clear attempt at state regulation of almost the entire area reserved by Congress to the National Labor Relations Board, and indeed if the petitioners were employees rather than supervisors, precedent would clearly dictate that state jurisdiction be preempted. If, for some reason, the national labor policy is not found to preempt the application of state law in this case, at least in North Carolina, supervisors will be subject to state law and entitled to damages awarded by state courts for violations of that law, at the same time that the workers they supervise will be subject to the regulations of the NLRB with its accompanying sanctions and reinstatement of wages. The result would be a lack of national uniformity and a serious imbalance in the relative strength of labor and management. As previously noted in the excerpt taken from House Report No. 245 of the 80th Congress, this was one of the shortcomings which Congress sought to avoid by the 1947 Taft-Hartley amendments. Congress, in forming a balance between labor and management in the 1947 amendments, necessarily decided not only what course of tactics should be forbidden to the unions and to management, but also what methods of persuasion should be permitted by both employers and unions. This permissiveness with regard to employers included a nation-wide labor policy of allowing employers to deal directly with supervisors, in

order to insure their loyalty and maintain a balance between labor and management.

Perhaps the only decision in which the United States Supreme Court has been faced with a case involving supervisors in a labor context, is that of *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). In *Hanna Mining* the plaintiff employers refused to bargain with the Marine Engineers Union until it was ascertained that the Union represented a majority of the engineers. In an obvious attempt at coercion, the Union then began picketing the plaintiffs' ships. The employers, charging a violation of Section 8 (29 U.S.C., §158) of the National Labor Relations Act, petitioned the National Labor Relations Board for representative elections. The Board dismissed the petition on the grounds that the engineers, as "supervisors," were excluded from the definition of employees under the Act. The plaintiffs then sued in Wisconsin state court for an injunction under a Wisconsin law which increased the restrictions on supervisor organizing. The lower state court dismissed for a lack of jurisdiction, and the Supreme Court of Wisconsin affirmed on the grounds that the picketing was not only illegal under state law but also arguably violated Section 8(b)(4)(B) and Section 8(b)(7) of the Act [29 U.S.C., §153(b)(4)(B) and §158(b)(7)]. The United States Supreme Court reversed in an eight member majority, deciding that Congress had made no considered decision generally to exclude state limitations on supervisory organizing. In answer to the Union's argument that state jurisdiction was preempted because of the congressional intent under Section 14(e) to adopt a laissez-faire attitude toward *supervisory organizing*, Mr. Justice Harlan, in writing for the majority, stated:

"This broad argument fails utterly in light of the legislative history, where the Committee reports reveal Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the legislatures fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted Section 8(b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing . . . " 382 U.S., at 189.

In the above passage the United States Supreme Court certainly sanctioned the same national labor policy as was recognized by the Supreme Court of North Carolina in the instant case. However, in *Hanna Mining* the Wisconsin state law was both consistent and compatible with the national labor policy of allowing employers to deal unhampered with supervisors. Certainly Congress did not decide, nor was there any legislative history that Congress did not decide, nor was there any legislative history that Congress intended that unions should be free to coerce supervisors into joining unions and employers into recognizing supervisory unions. As noted by the United States Supreme Court in footnote 14, 382 U.S. 193, the conduct considered in *Hanna Mining* did not fall in that middle range impliedly withdrawn from state control, although not arguably protected by the Act. Indeed, the secondary pressure intended to coerce unwilling supervisors into accepting the representation of the union was one in which the state courts of Wisconsin had a valid and very real interest, and in which the necessity for federal preemption was at a minimum. If state injunctive relief had been preempted, the plaintiffs would have been

compelled to bargain with the supervisory union. This in turn would have frustrated the national labor policy against such pressure on employers.

Unlike *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965), the present case does not involve a state statute which is consistent with and in furtherance of national labor policy. Whether applied to employees or supervisors, Sections 95-78 through 95-84 of the North Carolina General Statutes represents an attempt by the state to regulate and control on a local level and in a different manner that which Congress intended to reserve on a national level. In short, the statutes involved in the case at bar are inconsistent with the national labor policy of allowing employers to insure the loyalty of their supervisors in order to maintain a balance in the organization and bargaining between labor and management.

It is the position of these respondents that the decision of the North Carolina Supreme Court was entirely in line and in support of the national labor policy expressed and intended by Congress in the 1947 Taft-Hartley amendments, and with the previous decisions of this Supreme Court and *San Diego Unions v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959); *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L.Ed. 2d 280, 84 S.Ct. 1253 (1964); and *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). The respondents further submit to this Supreme Court that the case at bar is not a proper case to be heard, in that the facts in the case have not been fully developed by trial, the applicable state statutes have not been finally construed by the North Carolina Supreme Court to include or exclude the petitioners as supervisors, and the statutes involved are relatively unique, rendering a

decision by this Supreme Court of little benefit outside of North Carolina.

CONCLUSION

The respondents respectfully submit that the decision of the North Carolina Supreme Court was correct and should be sustained by a denial of this Petition for Writ of Certiorari. The respondents further submit that this case is not ready for review by this Court because the applicable state statute has not been finally construed nor the facts fully developed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, H. Gardner Hudson, hereby certify that on this day I served copy of the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI upon counsel of record for the Petitioners by depositing copy thereof in the United States Mail in Winston-Salem, North Carolina, postage prepaid, and addressed as follows:

Mr. Larry L. Eubanks
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This the 19th day of June, 1973.

H. Gardner Hudson
Attorney for Respondents

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Supreme Court of the United States

October Term, 1973

No. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI AND
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OF NORTH CAROLINA, INC.
AND RAY F. MESSICK

On Writ of Certiorari to The Supreme Court of The State of North Carolina

---

BRIEF FOR PETITIONERS

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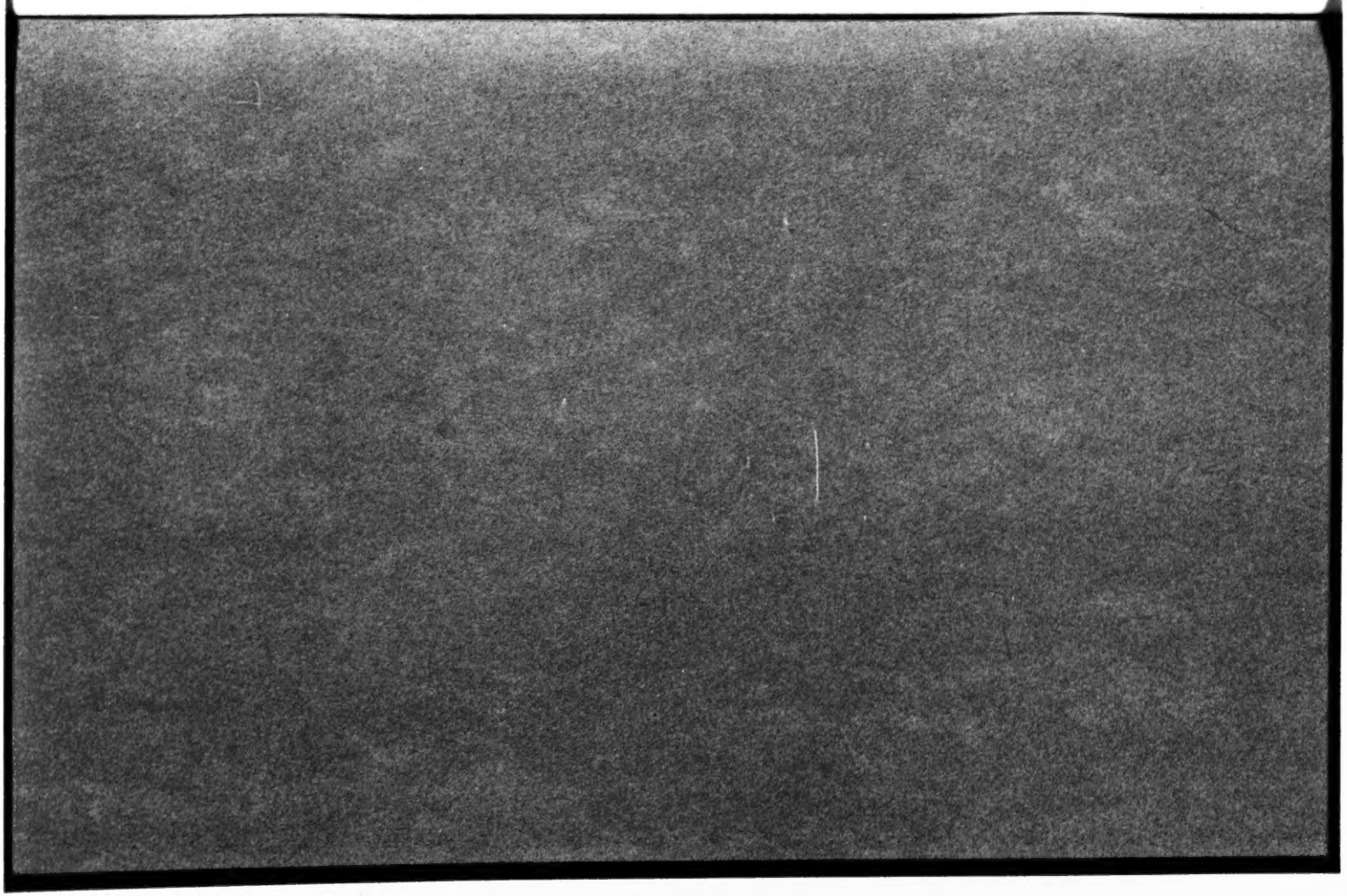

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Supreme Court of the United States

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ULYSSES VERNON BEASLEY,
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FOOD FAIR OF NORTH CAROLINA, INC.
AND RAY F. MESSICK

On Writ of Certiorari to The Supreme Court of The State of North Carolina

---

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals of the State of North Carolina is reported at 15 N.C. App. 323, 190 S.E. 2d 333 (1972), which reversed summary judgment for defendants entered by the Honorable Judge Robert M. Gambill, at

the 28 February, 1972, session of the Forsyth County Superior Court. The opinion of the Court is reprinted in the "Single Appendix" beginning at page 13. The opinion of the Supreme Court of the State of North Carolina is reported in 282 N.C. 530, 193 S.E. 2d 911 and reprinted in the "Petition for a Writ of Certiorari" begin- at page A.1.

JURISDICTION

The judgments and opinion of the Supreme Court of the State of North Carolina were made and entered on January 26, 1973. (193 S.E. 2d 911). The petition for a writ of certiorari was filed on May 29, 1973, an extension of time to file the same having been granted by the Honorable Judge Warren E. Burger April 26, 1973 (Petition p. A. 31). Certiorari was granted October 15, 1973. The jurisdiction of this Court rests upon 28 U.S.C. 1257 (3).

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent portions of the North Carolina Right-To-Work Law, chapter 328, Session Laws of 1947, codified as North Carolina General Statutes 95, Sections 78 through 84, are set forth in the Appendix at pages 16-18.

In addition, Section 14(a) of the National Labor Relations Act, codified as 29 U.S.C. Section 164(a) is set forth in the Appendix at page 19.

QUESTIONS PRESENTED

Whether there is any federal law which pre-empts a state from enacting a statute prohibiting an employer from discharging a person, *i.e.*, a supervisor, for membership in a labor union, organization, or association.

STATEMENT

The Petitioners, ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI, and JOE W. JONES, were, until June 26, 1971, employed by the defendant, FOOD FAIR OF NORTH CAROLINA, INC. On the above-mentioned date, two days after Local Union No. 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as the Union), won a majority in a National Labor Relations Board election, they were discharged. The Petitioners, through counsel, have steadfastly averred that the said discharges were unlawful in that the Petitioners were discharged solely due to their membership in the aforesaid Union.

The Union began an organizing campaign at defendant's Winston-Salem, North Carolina stores in the Spring of 1971. In the course of that organizing campaign, the three Petitioners named herein signed membership applications to join the Union and were accepted into membership in April and May of 1971. There is no evidence that they actively engaged in any pro-union activity.

On May 18, 1971, the local Union petitioned the National Labor Relations Board for an election among "all meat department employees at the Employer's stores in Forsyth County, North Carolina, but excluding stores managers, assistant store managers, grocery employees, produce employees, warehousemen, cashiers, office clerical

employees, guards, and supervisors as defined in the Act:" (Case No. 11-RC-3330). The Board granted the petition and ordered the election to be held on June 24, 1971. The three plaintiffs herein were excluded from participating in the election since they were determined by the Board to be supervisors. (A. p. 9) Directly after the election, they were discharged by defendant Messick, President of Food Fair Stores of North Carolina, Inc.

In June of 1971, the Union brought charges before the National Labor Relations Board alleging, *inter alia*, the discharge of the Petitioners herein to be violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended 29 U.S.C. 141 *et seq.*. (Case No. 11-CA-4622). It was the considered opinion of the General Counsel of the National Labor Relations Board that the plaintiffs were supervisors within the meaning of Section 2(11) of the National Labor Relations Act and hence not entitled to the protection of the Act. (See letter dated December 30, 1971 - A. p. 13).

Immediately following the Board's decision that the three Petitioners herein were not protected by Federal law, the complaint in the case at bar was filed. It alleges basically a violation of the North Carolina Right-To-Work Law, General Statutues 95-78, 95-81 and 95-83 (See Appendix pp. 16-17).

The defendant's Motion To Dismiss, Motion For Judgment on the Pleadings, and Plea in Abatement were heard by Judge Robert M. Gambill on February 21, 1972, (A. p. 4). Among other averments, the defendants asserted that the National Labor Relations Board had exclusive jurisdiction over the subject matter of this action and that as supervisors the Petitioners were therefore not protected by

the provisions of North Carolina General Statute 95-78 *et seq.*. Judge Gambill ruled, by Order dated February 28, 1972, that the Petitioners had failed to state a claim upon which relief could be granted and further that there was no genuine issue as to any material fact and that the defendants were entitled to judgment of dismissal as a matter of law. (A. p. 13).

The Petitioners appealed, excepting and assigning as error the ruling that the Petitioners were not protected by the North Carolina Right-To-Work Law, General Statutes 95-78 *et seq.*. (See Appendix, p. 16-17). The appeal was heard by the Court of Appeals of the State of North Carolina during the Spring Term of 1972, and the full panel of judges reversed the decision of the lower Court on August 2, 1972. (190 S.E.2d 333). The Court of Appeals, interpreting the decision of the United States Supreme Court in *Hanna Mining v. Marine Engineers,* 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965) as it relates to the decision in *San Diego Unions v. Garmon,* 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773, held:

> "That a state does have jurisdiction over activities of supervisors because the activities of supervisors could not be arguably either prohibited or protected under the Act (National Labor Relations Act), we reach the conclusion that in the case before us where, as in *Hanna,* the union members involved have been classified by the National Labor Relations Board as supervisors, the State Court has jurisdiction."

This view expressed by the North Carolina Court of Appeals was espoused by the Petitioners in their initial brief before that Court:

> "Counsel must, in order to fully protect its position, establish: . . . (2) That the matter is not covered or pre-empted by Federal law, and is therefore subject to State law . . ."

Immediately upon rendition of the North Carolina Court of Appeals decision the defendants petitioned the Supreme Court of North Carolina for Certiorari, and it was granted on August 15, 1972. The defendants challenged the North Carolina Court of Appeals' interpretation of Federal law and in particular its interpretation of the *Garmon Doctrine* and the *Hanna Mining Case*.

On January 23, 1973, the North Carolina Supreme Court rendered its decision reversing the North Carolina Court of Appeals. Stating in conclusion:

> "When, as in the present case, the facts disclose that plaintiffs as supervisors seek to invoke a remedy precluded by the established national policy, the doctrine of federal pre-emption applies, and the State Court is without jurisdiction over the subject matter of the controversy."

The Petitioners submit that the provisions of the North Carolina Right-To-Work Law provide them a remedy which is not precluded by any established national policy. Notwithstanding the pre-eminance of Federal law in the arena of Labor relations. The State Court does have jurisdiction over the subject matter of this controversy.

ARGUMENT

I. FEDERAL LAW DOES NOT PRE-EMPT STATES FROM REGULATING UNION MEMBERSHIP OF SUPERVISORS.

The 1947 Taft-Hartley amendments to the National Labor Relations Act (Labor Management Relations Act of 1947, 29 U.S.C. Sections 151, *et seq.*) and hereinafter referred to as the Act and in particular Section 164(a) and (b) bear significant weight when considering the points at issue:

> "29 U.S.C. Section 164(a) - Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [Sections 151-158, 159-168 of this title] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either National or Local, relating to collective-bargaining.
>
> (b) - Nothing in this Act [Sections 151-158, 159-168 of this title] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

Prior to these amendments, the National Labor Relations Act specifically protected the right of all persons regardless of employment status to join or assist labor organizations. *Packard Motor Co. v. National Labor Relations Board*, 330 U.S. 485, 67 S.Ct. 789, 19 L.R.R.M. 2397 (1947). It is now well apparent that the Taft-Hartley

amendments exclude supervisors from the protection of the Act. *National Labor Relations Board v. Big Three Welding Co.*, 359 F.2d 77 (5th Cir. 1966). *National Labor Relations Board v. Charley Toppino and Sons, Inc.*, 332 F. 2d 85 (5th Cir., 1964). In *Oil City Brass Works v. National Labor Relations Board*, 357 F.2d 466, 61 L.R.R.M. 2318 (5th Cir., 1966), the same Court said:

> "If Hammock was fired solely because of his union affiliation, there has been no unfair labor practice on which the Board can predicate its Order. The National Labor Relations Act does not protect supervisory personnel. [citations omitted]. It is settled that the Act does not preclude a company from firing or refusing to recall from layoff status a supervisory employee solely because that employee is affiliated with a union. [citations omitted]." 61 L.R.R.M. at p. 2320.

The Ninth Circuit Court of Appeals reached the same conclusion in *National Labor Relations Board v. Fullerton Publishing Company*, 203 F.2d 545 (9th Cir. 1960). In that case the county news editor of a newspaper was deemed to be a supervisor. The Court then said:

> "The law is clear that a supervisor is not entitled to the protection afforded ordinary employees under the National Labor Relations Act, and as to supervisors there can be no such thing as a discriminatory discharge or unfair labor practice . . ."

Accord, *National Labor Relations Board v. Inter-City Advertising Co.*, 190 F.2d 420 (4th Cir., 1951), cert. den., 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 301 (1952); *National Labor Relations Board v. Griggs Equipment, Inc.*, 307 F.2d 273 (5th Cir., 1962).

While all of the above cases affirm that the National Labor Relations Act does not protect supervisors, none of them develop the point here at issue—does a National Labor Relations policy pre-empt a state law which protects supervisors from discharge due solely to union membership? In *National Labor Relations Board v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, cert. denied, 335 U.S. 908, 69 S.Ct. 411 (6th Cir. 1948) it was stated:

> "The right of self-organization and of selection of a bargaining representative are rights which exist independently of either national or local labor relations acts. It was recognized and characterized as a fundamental right long before it was protected under the National Labor Relations Act and similar state acts . . . It was the regulation of this fundamental right of supervisory personnel formerly included within the Federal act that the 1947 amendatory provisions left to the states for separate classification and regulation." *Id.* at p. 577.

This position was quickly adopted by the State Courts throughout the country having occasion to deal with the subject. The California Court, in *Safeway Stores, Inc. v. Retail Clerks International Association*, 41 Cal. 2d. 567, 261 P.2d. 721, held the exclusion of supervisory employees and the regulation of their collective-bargaining rights from the National Labor Relations Act, as amended, left the field open completely to State control. The same conclusion is reached in *Martineau v. Director of Division of Employment Security*, 329 Mass. 44, 106 N.E. 2d. 420.

The case of *Hanna Mining Co. v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327, 60 L.R.R.M.

2473 (1965) presents an excellent discussion of the doctrine of Federal pre-emption as it relates to supervisory personnel. In *Hanna*, the plaintiffs, employers, refused to negotiate with a union representing the Marine Engineers until it was established that the union represented a majority of the engineers. In response the union picketed the employer's ships. The plaintiffs petitioned the National Labor Relations Board requesting that a representation election be held, but the Board declined stating that the engineers were supervisors and therefore excluded from the definition of employees as defined by the Act (29 U.S.C. Section 152(2)). The employer filed an unfair labor practice charge against the union alleging a violation of Section 8 (29 U.S.C. Section 158) of the Act. The Board dismissed the charges on the ground that the union's conduct fell outside the provisions of the Act because it sought to represent "supervisors" rather than "employees". The employers next brought suit in the courts of the State of Wisconsin seeking injunctive relief, and their suit was dismissed for lack of jurisdiction over the subject matter. The Supreme Court of the State of Wisconsin affirmed its lower court decision asserting that the matter was governed by Federal law and within the exclusive jurisdiction of the National Labor Relations Board.

In reversing, the Supreme Court of the United States said:

> "The ground rules for pre-emption in Labor Law, emerging from our *Garmon* decision should first be briefly summarized: in general, a state may not regulate conduct arguably 'protected by Section 7, or prohibited by Section 8' of the National Labor Relations Act. See 359 U.S., at 244-246, and the Legislative purpose may further dictate that certain activity 'neither

> protected nor prohibited be deemed privileged against state regulation, cf. 359 U.S. at 245.
>
> For the reasons that follow, we believe the Board's decision that Hanna engineers are supervisors *removed from this case most of the opportunities for pre-emption.*" (emphasis supplied.) 382 U.S. at pp. 187-188.

The Court reasoned that exclusion of supervisors from the definition of employees had the obvious result that many provisions of the Act employing the term "employees" would cease to operate where supervisors were the focus of concern. There can be no protection by Section 157 nor prohibition by Section 158. It was argued by the union that Section 164(a) ousted both state and federal authority and signified a "laissez-faire" attitude toward supervisors. The Court found no merit in this argument since "the committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees. Whether the Legislators fully realized that their method of achieving this result incidently freed supervisors' unions from certain limitations under the newly enacted Section 8(b) [29 U.S.C. Section 158(b)] is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing." 382 U.S. at pp. 189-190.

The crux of the *Hanna* decision is the doctrine of federal pre-emption enumerated by Mr. Justice Frankfurter, speaking for the majority of the Court, in *San Diego Unions v. Garmon,* 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959).

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected

> by Section 7 (29 U.S.C. Section 157) or prohibited by Section 8 (29 U.S.C. Section 158) then the matter is at an end, and the states are outsted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the states." 359 U.S. at p. 245.

The petitioners concede that nothing in the National Labor Relations Act protects supervisors from discharge for union membership. The petitioners do not agree, as the respondents might suggest, that supervisors are prohibited from union membership by the National Labor Relations Act or any National Labor relations policy. Section 14(a) (29 U.S.C. 164(a)) of the Act plainly states that nothing shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization. While the latter part of the section allows that no employer shall be compelled to deem individuals defined as supervisors employees for the purpose of collective-bargaining, the petitioners submit that under the stated facts and the North Carolina Right-To-Work Law they seek only to be deemed "persons" not "employees" and further they do not seek the right to collectively bargain with their employer but simply a remedy for their discharge.

II. BY ENACTMENT OF SECTION 14(b) OF THE LABOR MANAGEMENT RELATIONS ACT, CONGRESS CEDED TO THE STATES JURISDICTION OVER THE APPLICATION OF STATE RIGHT-TO-WORK LAWS.

When Congress amended the National Labor Relations Act in 1947 and gave birth to Section 14(a) of the Act

(29 U.S.C. Section 164(a)), which effectively excluded supervisors from its protection, Congress also enacted Section 14(b) quoted above. Section 14(b) specifically authorized the passage of state right-to-work laws which make unlawful a union or agency shop agreement which would otherwise be lawful by virtue of Section 8(a)(3) of the Act. (29 U.S.C. Section 158(a)(3)). Pursuant to this statutory authorization, the State of North Carolina enacted a right-to-work law which is contained in Article 10 of Chapter 95 of the General Statutes and became effective March 18, 1947. The general philosophy of this law as expressed by the North Carolina General Assembly in North Carolina General Statute 95-78 is as follows:

> "The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraint and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association. (1947, C. 328, S. 1)

North Carolina General Statute 95-81 provides that persons may maintain causes of action for damages against their employer for violation of the provisions of the right-to-work law.

> N.C.G.S. 95-83–"Any person who may be denied employment or be deprived of

> continuation of his employment in violation of Sections 95-80, 95-81 and 95-82 or of one of more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment."

The North Carolina Right-To-Work Law was upheld by the North Carolina Supreme Court in *State v. Whitaker,* 228 N.C. 352, 45 S.E.2d 860 (1947). Like or similar laws have been upheld by the United States Supreme Court. *Lincoln Fed. L. U. v. Northwestern I & M Co.,* 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251, 6 A.L.R.2d 473 (1949).

The application and enforcement of state right-to-work laws have been the subject of discussion in regard to their relationship to the doctrine of federal pre-emption in the field of labor relations. Section 14(b) of the National Labor Relations Act authorizing states to enact right-to-work laws has been interpreted as ceding to the states the power to enforce such laws without treading on pre-empted territory. *Higgins v. Cardinal Mfg. Co.,* 360 P.2d 456 (Kan. S.Ct. 1961) cert. den., 368 U.S. 829; *Algoma Plywood Co. v. Wis. Board,* 336 U.S. 301, 93 L.Ed. 691, 69 S.Ct. 584, 23 L.R.R.M. 2402 (1949); *Retail Clerks v. Schermerhorn,* 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed. 2d 179, 54 L.R.R.M. 2612 (1963).

In the *Schermerhorn* case (sometimes known as Schermerhorn II) the Court explained to some degree the significance of its decision in *Garmon, supra.*

> "Garmon does not state a constitutional principle; it merely rationalizes the problems

> of co-existence between federal and state regulatory schemes in the field of labor relations; and it did not present the problems posed by Section 14(b), *viz.*, whether the Congress had precluded state enforcement of select state laws adopted pursuant to its authority."

After concluding that states could properly enforce the provisions of their right-to-work laws the Court noted that "Congress . . . chose to abandon any search for uniformity in dealing with the problems of state laws barring the execution and application of agreements authorized by Section 14(b) and decided to suffer a medley of attitudes and philosophies on the subject."

Citing *Schermerhorn II* as their authority, a few courts have held that in suits brought by employees for wrongful discharge under an appropriate local right-to-work law the state court is the proper jurisdiction for the adjudication of the controversy. In *West v. Operating Engineers,* 70 C.C.H. LC Paragraph 13, 327, (U.S.D.C. S.D. Miss., 1972) a federal district court in a lengthy opinion declined to accept jurisdiction of such a cause of action and, on motion of the plaintiff, remanded the case back to the state court where it had begun. The Mississippi Right-To-Work Law reads much the same as the North Carolina Right-To-Work Law.

> Mississippi State Constitution Section 198A "It is hereby declared to be the public policy of Mississippi that the right of a person or persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. . ."

Quoting from Schermerhorn, the District Court stated:

> "In the light of the wording of Section 14(b) and this Legislative history, we conclude that Congress did not deprive the states of any and all power to enforce their laws restricting the execution and enforcement of union-security agreements. Since it is plain that Congress left the states free to legislate in that field, we can only assume that it intended to leave unaffected the power to enforce those laws . . ."

In a case decided by the Supreme Court of Appeals of the State of Virginia, an employee who was discharged solely due to his non-membership in a union sought a remedy in the local courts of the State of Virginia based on Virginia's Right-To-Work Law, Article 3, Title 40.1 of the Code of Virginia, *Moore v. Local 10, Plumbers*, 179 S.E.2d 15, 76 L.R.R.M. 2391 (1971). The defendants raised the argument of federal pre-emption but the Virginia court citing *Schermerhorn II, supra*, held that the trial court had jurisdiction to entertain the action. The Court elaborated on the *Schermerhorn* decision to a degree by holding that the intention of the court in Schermerhorn would include oral as well as written union-security agreements.

Your petitioner concedes that the above cited cases are not on "all-fours" with the instant controversy. In all the reported cases an employee or group of employees have been deprived of their right to employment by a union-security agreement either written or oral in controvention of State law. The petitioner does not contend that a union-security agreement existed under the facts in the instant controversy. The petitioner submits, however, that right-to-work laws are two-edged swords. While no one doubts that their primary intention is to free persons from being coerced or forced into union membership as a condition of employment, right-to-work laws, as the North Carolina Statute in question, also provide to persons protection for

union membership. This is the basis of the status quo. One type of activity cannot be protected if not the other. Your petitioner submits that in view of the line of cases beginning with *Algoma Plywood Co.* and *Schermerhorn II*, the court has consistently held that the application and enforcement of local right-to-work laws is a proper subject for state jurisdiction and your petitioner requests that this cause of action be remanded to the Supreme Court of the State of North Carolina for its final determination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Larry L. Eubanks, hereby certify that on this day I served a copy of the foregoing PETITIONER'S BRIEF upon counsel of record for the Respondents by depositing copy thereof in the United States Mail in Winston-Salem, North Carolina, postage prepaid, and addressed as follows:

Mr. H. Gardner Hudson
610 Reynolds Building
Winston-Salem, North Carolina 27101

This the day of November, 1973.

/s/ LARRY L. EUBANKS
Larry L. Eubanks
Attorney for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 72-1597

ULYSSES VERNON BEASLEY,
EMIDIO J. BASSETTI and
JOE W. JONES,

Petitioners,

v.

FOOD FAIR OF NORTH CAROLINA, INC.
and RAY F. MESSICK,

Respondents.

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v.

FOOD FAIR OF NORTH CAROLINA, INC.
and RAY F. MESSICK,

Respondents.

BRIEF FOR RESPONDENTS

OPINIONS BELOW

At the February 28, 1972, Session of the Forsyth County Superior Court, the Honorable Judge Robert M. Gambill entered summary judgment for the defendants Food Fair of North Carolina, Inc. and Ray F. Messick. The Court of Appeals of the State of North Carolina, as reported at 15 N.C. App. 323, 190 S.E.2d 33 (1972), reversed the decision of the Honorable Judge Robert M. Gambill. The Supreme Court of the State of North Carolina, as reported at 282 N.C. 530, 193 S.E.2d 911 (1973), reversed the decision of the Court of Appeals of

the State of North Carolina and ordered that judgment be entered affirming the decision of the Honorable Judge Robert M. Gambill.

QUESTION PRESENTED

Are the Courts of the State of North Carolina preempted or otherwise prevented by Federal law from adjudicating a claim brought by supervisors against their employer under the provisions of Sections 95-78 through 95-84 of the North Carolina General Statutes for an alleged discharge as a result of union membership and activity?

STATEMENT OF CASE

The petitioners herein were meat market managers for the respondent, Food Fair of North Carolina, Inc., who were discharged allegedly because they actively supported a union in its attempt to organize the company's rank and file employees. The petitioners filed charges with the National Labor Relations Board, claiming that their discharges were unlawful under the National Labor Relations Act, as amended. The Regional Director of the Board dismissed the charges because of "insufficient evidence of violation." He also determined that petitioners were supervisors and not "employees" and therefore not entitled to protection under the Act. The investigation of the Regional Director of the Board revealed that the petitioners independently and on their own authority scheduled both the regular hours and overtime hours of employees who worked under their direction, told the employees what work to do, exercised the authority to grant time off, and exercised their authority on their own to hire and fire meat market

employees as well as made recommendations for the hiring and firing of other employees, and at least in one instance effected a raise for an employee on their own authority (Appendix, pp. 11, 12). The petitioners appealed the Regional Director's decision, but this appeal was denied by the Board's General Council on the grounds that, as managers, they were supervisors within the meaning of the Act, and therefore not protected by that Act (Appendix, p. 13). The petitioners then filed this action in the Forsyth County Superior Court of the State of North Carolina, alleging that they were unlawfully discharged because of their active support of and membership in the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, in violation of Section 95-81 of the North Carolina General Statutes. The petitoners further requested monetary damages under Section 95-83 of the North Carolina General Statutes. The respondents then filed a motion to dismiss and motion for judgment on the pleadings, alleging, among other things, that supervisors were not included in the protection of the relevant state statutes, and that the Board had exclusive jurisdiction, thereby precluding the state court's consideration under North Carolina law of the facts and circumstances of this case.

The cause was heard before the Honorable Judge Robert M. Gambill during the February 21, 1972, Session of Civil Superior Court in Forsyth County, North Carolina. During the hearing all parties stipulated that each of the petitioners was, at all times complained of, a "supervisor" of Food Fair of North Carolina, Inc., and the trial court entered summary judgment for the respondents on February 28, 1972.

The Court of Appeals of the State of North Carolina reversed the trial court and held that state courts were

not preempted from regulating conduct between employers and supervisors.

The respondents then petitioned the Supreme Court of North Carolina for a Writ of Certiorari to the North Carolina Court of Appeals for review of its decision, and on September 14, 1972, that Petition was allowed.

The Supreme Court of North Carolina reversed the ruling of the Court of Appeals, holding that because the petitioners sought to invoke a remedy inconsistent with national labor policy, North Carolina state courts were precluded under the federal preemption doctrine from asserting subject matter jurisdiction over the case. The Supreme Court of North Carolina did not reach the issue of whether or not the petitioners, as supervisory personnel, came within the provisions of Sections 95-78, 95-81 and 95-83 of the North Carolina General Statutes and that issue has as yet not finally been determined by the North Carolina Supreme Court.

The petitioners then petitioned the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of North Carolina, and certiorari was granted on October 15, 1973.

SUMMARY OF DISCUSSION

The present case concerns whether or not a state can regulate the relationship between an employer and his supervisor in a labor relations context, and in particular whether an employer can freely fire his supervisor for union membership and activity.

The legislative history, statutory construction, and case law indicate that Congress intended that this activity, although "neither protected nor prohibited" be deemed privileged against state regulation. Congress, in establishing a national labor policy and attempting to preserve the

delicate balance between labor and management within the framework of that national policy, intended that an employer be able to freely fire his supervisors in order to insure their loyalty. If a state is allowed to award damages to a supervisor from an employer because the employer fired the supervisor for union membership and activity, this would seriously weaken the employer's position and destroy the balance intended by Congress, and force the employer one step closer to actually being forced to bargain with supervisors as though they were employees.

Practically, review by certiorari is not sufficient to meet the problem of safeguarding national labor policy which might be affected by the administration of state laws by state courts. Even if a rule of easy application is formulated for use by state courts, different results and problems must arise when the rule is applied by the various state courts utilizing separate procedural rules. More importantly, Congress sought to provide for comprehensive treatment of labor-management relations, and the subjection of relations with supervisors and employees to different state laws as well as federal laws would impede the resolution of problems involving employers situated in more than one state.

If preemption does not apply, then state courts should at least be limited to the application of a uniform federal substantive law consistent with national labor policy.

DISCUSSION

The factual situation under which the present case arose did not concern the usual exceptions to the pre-emptive doctrine involving violence imminently dangerous to the public interest, libel, the enforcement of collective bargaining agreements under Section 301 of the

Labor-Management Relations Act (29 U.S.C. 185), damage actions for unlawful secondary boycotts under Section 303 (29 U.S.C. 187), union security agreements, or the construction of contractual agreements and union internal affairs. This case does involve, however, the primary question of whether or not a state can regulate the relationship between an employer and his supervisor in a labor relations context. This question must be considered against the background of the Labor-Management Relations Act, which defines an "employer" to include any person acting as agent of the employer; which excludes "supervisor" from the definition of employee and protection of the Act (29 U.S.C. 152); and which specifically provides that no employer shall be compelled to deem supervisors as employees for the purpose of any law relating to collective bargaining (29 U.S.C. 164) (Appendix, pp. 18, 19). The respondents respectfully contend that Federal case law, congressional intent, national labor policy, and reasons of practicality dictate that the area of labor-management relations between an employer and his supervisors are not subject to state control and regulation.

Prior case law has clearly established that a state has neither the jurisdiction nor the authority to regulate conduct between labor and management where such conduct is protected by Section 7 (29 U.S.C.A. 157), or prohibited by Section 8 (29 U.S.C.A. 158) of the National Labor Relations Act, as amended. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965). This Court has also clearly decided that whether a particular activity is protected by Section 7 or prohibited by Section 8 of the National Labor Relations

Act, as amended, must be left in the first instance to the National Labor Relations Board, at least in those instances where the question has not been clearly determined otherwise. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775, 79 S.Ct. 773 (1959); *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965).

In the present case the petitioners did file charges with the National Labor Relations Board, which charges were dismissed because of insufficient evidence of violation and because the petitioners were supervisors and not employees, and therefore not entitled to the protection of the National Labor Relations Act. A subsequent appeal to the Board's General Council was also denied on the grounds that the petitioners were supervisors within the meaning of the Act, and therefore did not come within the protection of the National Labor Relations Act (See letter of NLRB General Council, Appendix, p. 13).

Although the present case does not come within the bounds of the more established "arguably" test utilized by the United States Supreme Court in *San Diego Unions v. Garmon*, supra, this Court has recognized an additional area not open to state jurisdiction. Thus, in *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed.2d 254, 86 S.Ct. 327 (1965), this Court stated the following guidelines:

> The ground rules for preemption in labor law, emerging from our *Garmon* decision, should first be briefly summarized: in general, a State may not regulate conduct arguably 'protected by §7, or prohibited by §8' of the National Labor Relations Act, see 359 U.S., at 244-246, *and the legislative purpose may further dictate that certain activity*

'neither protected nor prohibited' be deemed privileged against State regulation, cf. 359 U.S., at 245. (Emphasis added)

This second area of activity is clearly the area within which the present case lies. That is, activity neither protected nor prohibited which legislative purpose has dictated be privileged against state regulation.

Prior to the Taft-Hartley Amendments to the Act, the Board's policy was to exclude supervisory personnel from collective bargaining units which included employees subject to the supervision of those same supervisors. Apparently the reason for this policy was to prevent coercion or intimidation by the employees of a supervisor on the subject of collective bargaining and unions, and vice-versa. At the same time, the Board and courts held that "supervisors" did enjoy some consideration under the Act because Congress had not elected to exclude them from the definition of "employee." *Packard Motor Car Company v. NLRB*, 330 U.S. 485, 91 L.Ed. 1040, 67 S.Ct. 789 (1947). In his dissent in the *Packard* case, Mr. Justice Douglas emphasized that unless Congress amended the Act, the Board's processes could be used to unionize all of management, even vice-presidents, since they were not specifically excluded from the category of "employees."

Against this background the Taft-Hartley Amendments to the Act were passed. The legislative purpose of those amendments, as revealed by the legislative history, clearly indicates that Congress specifically intended to relieve employers from any compulsion under either Federal or state law to bargain with or be restricted in their dealings with supervisors, either in an individual or organized capacity. In the House Report No. 245, 80th Congress, 1st Session, beginning at page 14, the following remarks

clearly indicate Congress' purpose to establish such a national policy:

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure the workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file unions have done much of the actual organizing of foremen, even when the foremen's union professes to be 'independent.' Without any questions, this is why the unions seek to organize the foremen." Id. at 14.

* * * * *

"MANAGEMENT, LIKE LABOR, MUST HAVE FAITHFUL AGENTS.—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to its persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what

pay they should receive for it, and to carry on the whole of labor relations." Id. at 16.

* * * * *

"So, by this bill, Congress makes clear once more what it tried to make clear when, in passing the act, it defined as an 'employer', not an 'employee', any person 'acting in the interest of the employer'; what it again made clear in taking up H.R. 2239 in 1943 and in dropping it when the Board decided the MARYLAND DRYDOCK case, and what, for a third time, it made clear last year in passing the CASE bill by a majority of about 2 to 1 and in barely falling short of enough votes to override the President's veto of this bill.

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: *That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom for any reason, he does not trust.* (Emphasis added)

"If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then CONGRESS MUST EXCLUDE FOREMEN FROM THE OPERATION OF THE LABOR ACT, NOT ONLY WHEN THEY ORGANIZE INTO UNIONS OF THE RANK AND FILE AND INTO UNIONS AFFILIATED WITH THOSE OF THE RANK AND FILE, BUT ALSO WHEN THEY ORGANIZE INTO UNIONS THAT CLAIM TO BE INDEPENDENT OF THE UNIONS

OF THE RANK AND FILE." Id. at 15. (Emphasis in original.)

* * * * *

"As under the present Act, the power of the Board under the amended Act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision . . . to give to the States a concurrent jurisdiction in respect to closed-shop and other union security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. IT CAN READILY BE SEEN THAT MISCHIEF MIGHT BE WROUGHT IF, FOR EXAMPLE, FOREMEN SHOULD BE SUBJECT TO STATE LAW AT THE SAME TIME THAT THE WORKERS THEY SUPERVISE ARE SUBJECT TO NATIONAL LAW. MOREOVER, THE BILL HEREWITH REPORTED VERY DEFINATELY STATES A NATIONAL POLICY IN RESPECT TO ORGANIZATION AND COLLECTIVE BARGAINING BY FOREMEN." House Report No. 245, 80th Congress, p. 40. (Emphasis added.)

The same theme is found in the Senate Committee Reports on the 1947 Taft-Hartley Amendment, and in particular Senate Report No. 105, 80th Congress, 1st Session, page 5:

"In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national Act from any compulsion by this National Board OR ANY LOCAL AGENCY to accord to the front line of management the anomalous status of employees." Id. at 5. (Emphasis added.)

With this judicial and legislative background in mind, Congress foresaw the increasing strength of organized labor and the serious national interest in maintaining the delicate balance of power between organized labor and the employer. In order to maintain that balance, Congress left to the employer the freedom to deal with his supervisor in a labor relations context by excluding the supervisor from the protections of the Act, and by further providing that although a supervisor was not prohibited from joining a union, the employer was not to be limited or regulated by either national or local law in his regulation or control of a supervisor. (29 U.S.C. 152, 164).

Since the 1947 amendments to the Act, the federal courts have consistently held that a supervisor is not protected under the Act from discharge due to union membership or activity. *NLRB v. Inter-City Advertising Company*, 190 F.2d 420 (4th Cir. 1951), *cert. den.*, 342 U.S. 908, 96 L.Ed. 679, 72 S.Ct. 301 (1952); *NLRB v. Fullerton Publishing Company*, 203 F.2d 545 (9th Cir. 1960); *NLRB v. Big Three Welding Equipment Company*, 359 F.2d 77 (5th Cir. 1966).

As noted by the Supreme Court of North Carolina in its decision in this case (Appendix to Petition for Writ of Certiorari, p. A1), the federal courts have gone further than simply holding that the National Labor Relations Act does not afford supervisory personnel protection. These courts have also clearly recognized the existence of the legislative purpose on the part of Congress to leave employers unfettered in dealing with union affiliation on the part of their supervisory personnel. Thus in the case of *NLRB v. Edward G. Budd Mfg. Company*, 169 F.2d 571 (6th Cir. 1948), *cert. den.*, 335 U.S. 908, 93 L.Ed. 441, 69 S.Ct. 401 (1949), one of the first cases

concerning supervisors after the 1947 amendments to the National Labor Relations Act, congressional intent was emphasized as follows:

> "We believe that it is clear that Congress intended by the enactment on the Labor Management Relations Act that employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities. . . ." 169 F.2d at p. 579.

Similarly, in *NLRB v. Retail Clerks Inter. Ass'n.*, 211 F:2d 759 (9th Cir. 1954) the legislative purpose was discussed at length, as follows:

> "A primary objective of §2(11) of the Act, to which reference is made in this paragraph of the decree, was to assure to the employer his right to procure the loyalty and efficiency of his supervisors and managers. The reports which accompanied the legislative bill which Congress enacted into the Labor Management Relations Act of 1947, made this abundantly clear. The reports were specific as to certain evils which the congressional committees thought they could avoid by excluding foremen and other supervisors from the operation of the Labor Act." 211 F.2d, at page 763.

Further, congressional intent was also considered in the case of *Carpenters District Council, etc. v. NLRB*, 274 F.2d 564 (D.C. Cir. 1959) as evidenced by the following excerpt:

> ". . . Congress was aware of the potential conflict between the obligations of foremen as representatives of their employers, on the one hand, and as union members, on the other. Section 2(3) evidences its intent to make the obligations to the employer paramount. That provision excepts foremen from the protection of the Act. Its purpose was

to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations. . ." 274 F.2d, at page 566.

The petitioners were meat market managers who independently and on their own authority scheduled regular and overtime work hours for other employees in their market, determined what work each employee should do, exercised the authority to grant time off for these employees, hired and fired meat market employees, and effectuated pay raises. Thus, in the present case, the petitioners acted as agents for the employer in the day-to-day administration of the employer's policies and would have been the employer's logical choice for advice on situations involving collective bargaining with meat market employees and for the implementation of any collective bargaining agreements between the employer and a union of meat market employees. As noted by the Courts in *NLRB v. Retail Clerks Inter. Ass'n.*, 211 F.2d 759 (9th Cir. 1954), and *Carpenters District Council, etc. v. NLRB*, 274 F.2d 564 (D.C. Cir. 1959), Congress realized the importance of insuring the loyalty of the supervisor to the employer; and in the Taft-Hartley Amendments to the Act specifically excepted supervisors from the protection of the Act, and prohibited any other regulation of the employer's conduct towards supervisors in a collective bargaining context in order to give the employer a free hand to discharge supervisors in order to insure their loyalty.

The national labor policy obviously intended by Congress and expressed by the courts of allowing employers relative freedom in dealing with supervisory personnel in order to insure their loyalty is only a part of the balance of protection, prohibition, and laissez faire

with respect to union organization, collective bargaining, and labor disputes struck by Congress in the framework provided for in the National Labor Relations Act and the Labor Management Relations Act.

In the case of *Teamsters Local 20 v. Morton*, 377 U.S. 252, 12 L.Ed.2d 280, 84 S.Ct. 1253 (1964), the United States Supreme Court was faced with the question of whether or not a state was preempted from regulating labor management relations where those regulations would upset the congressional balance of protection, prohibition, and laissez faire, even though the activities to be regulated are neither protected nor prohibited by Sections 7 and 8 of the National Labor Relations Act. In that case Morton was engaged in hiring out trucks and drivers for use in highway construction, and Local 20 represented Morton's employees. During a strike over the terms of a new collective bargaining agreement, Local 20 persuaded the management of one Morton's customers to refrain from doing business with Morton during the strike. Since the customer was not threatened with any form of reprisal, the persuasion to boycott Morton was not an unfair labor practice, and Local 20 appears to have agreed that it was not protected by Section 7 of the National Labor Relations Act. However, the persuasion of customers was a violation of Ohio law, and a federal district court awarded damages for that violation. In reversing the decision of the lower federal court, the Supreme Court of the United States acknowledged that the activity was neither protected nor prohibited, but was nonetheless inimical to a national labor policy:

> "It is the respondent's contention, however, that since the petitioner union's peaceful conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the National Labor Rela-

tions Act, as amended, the trial court was free to award damages on the basis of state law for injuries caused by this conduct. But even though it may be assumed that at least some of the secondary activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting §303, 'Congess occupied this field and closed it to state regulation.' *Automobile Workers v. O'Brien*, 339 U.S. 454, 457, 94 L.Ed. 978, 983, 70 S.Ct. 781. The basic question, in other words, is whether 'in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law.' *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 102 7 L.Ed.2d 593, 598, 82 S.Ct. 571. *The answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation.*" (Italics supplied) 377 U.S., at 258.

and further,

"This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. *Electrical Workers Local 761 v. Local Board*, 366 U.S. 667, 672. If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted [8(b)(4)], the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. 'For a state to impinge on

> the area of labor combat designed to be free is quite as much an obstruction of legal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.' *Garner v. Teamsters Union*, 346 U.S. 485, 500. 377 U.S., at 259, 260.

The present case is indeed an even easier one for application of this doctrine than that of *Teamsters Local 20 v. Morton, supra*, in that the issue presented in the case at bar is one in which Congress has clearly evidenced its intent, as previously discussed. The relevant North Carolina statute (if interpreted to encompass supervisors) is an attempt at state regulation of collective bargaining between an employer and his supervisor, and especially the employer's right to fire his supervisor for union activities.[1] Certainly if this is not a direct attempt by the state to influence collective bargaining with the supervisor, and the respondents contend that it is, then the application of state law does operate at the very least to frustrate the purpose of federal legislation prohibiting local law requiring collective bargaining with supervisors. Surely if petitioners were employees rather than supervisors, precedent would dictate that state jurisdiction be preempted.

If the national labor policy is not found to preempt the application of state law in this case, then in North

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[1] N.C.G.S. 95-78 through 95-84, Appendix pp. 16-18. The North Carolina Supreme Court decided that the pre-emption doctrine applied to the present case, and therefore reserved the right to determine if later necessary whether or not the statutes apply to supervisors. 282 N.C. 530, at p. 542 (Appendix to Petition for Writ of Certiorari, p. A18).

Carolina supervisors will be subject to state law and entitled to damages awarded by jury verdicts for violation of that law, while the workers they supervise will be subject to the regulations of the NLRB with its accompanying sanctions and reinstatement of wages. The result would be a lack of national and state uniformity, with each state imposing different sanctions and remedies, and create a serious imbalance in the relative strength of labor and management. As previously noted in the excerpt from House Report No. 245 of the 80th Congress, this was one of the situations which Congress sought to prevent by the 1947 Taft-Hartley amendments. Congress, in forming a balance between labor and management in the 1947 amendments, necessarily decided not only what course of tactics should be forbidden to the unions and to management, but also what methods of persuasion should be permitted by both employers and unions. This permissiveness with regard to employers included a national labor policy of allowing employers to deal directly with supervisors in order to insure their loyalty and maintain a balance between labor and management.

The only decision in which the United States Supreme Court has been faced with a case involving supervisors in a labor context is that of *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965). In *Hanna Mining* the plaintiff employers refused to bargain with the Marine Engineers Union until it was ascertained that the Union represented a majority of the engineers. In an obvious attempt at coercion, the Union then began picketing the plaintiffs' ships. The employers, charging a violation of Section 8 (29 U.S.C., §158) of the National Labor Relations Act, petitioned the National Labor Relations Board for representative elections. The

Board dismissed the petition on the grounds that the engineers, as "supervisors," were excluded from the definition of employees under the Act. The plaintiffs then sued in Wisconsin state court for an injunction under a Wisconsin law which increased the restrictions on supervisor organizing. The lower state court dismissed for a lack of jurisdiction, and the Supreme Court of Wisconsin affirmed on the grounds that the picketing was not only illegal under state law but also arguably violated Section 8 (b)(4)(B) and Section 8(b)(7) of the Act [29 U.S.C., §153(b)(4)(B) and §158(b)(7)]. The United States Supreme Court reversed in an eight member majority, deciding that Congress had made no considered decision generally to exclude state limitations on supervisory organizing. In answer to the Union's argument that state jurisdiction was preempted because of the congressional intent under Section 14(e) to adopt a laissez-faire attitude toward *supervisory organizing*, Mr. Justice Harlan, in writing for the majority, stated:

> This broad argument fails utterly in light of the legislative history, where the Committee reports reveal Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union or supervisory employees. Whether the legislatures fully realized that their method of achieving this result incidentally freed supervisors' unions from certain limitations under the newly enacted Section 8(b) is not wholly clear, but certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing . . ." 328 U.S., at 189.

In the above passage the United States Supreme Court certainly sanctioned the same national labor policy as was

recognized by the Supreme Court of North Carolina in the instant case. However, in *Hanna Mining* the Wisconsin state law was only concerned with the regulation of supervisory organization and was both consistent and compatible with the national labor policy of allowing employers to deal freely with supervisors without regulation. Certainly Congress did not decide, nor was there any legislative history that Congress intended that unions should be free to coerce supervisors into joining unions and employers into recognizing supervisory unions. As noted by the United States Supreme Court in footnote 14, 382 U.S. 193, the conduct considered in *Hanna Mining* did not fall in that middle range impliedly withdrawn from state control, although not arguably protected by the Act. Indeed, the secondary pressure intended to coerce unwilling supervisors into accepting the representation of the union was one in which the state courts of Wisconsin had a valid and very real interest, and in which the necessity for federal pre-emption was at a minimum. If state injunctive relief had been preempted, the plaintiffs would have been compelled to bargain with the supervisory union. This in turn would have fustrated the national labor policy against such pressure on employers.

Unlike *Hanna Mining v. Marine Engineers*, 382 U.S. 181, 15 L.Ed. 2d 254, 86 S.Ct. 327 (1965), the present case does not involve a state statute which regulates union activity, but rather involves a state's attempt to regulate an employer's relationship with his supervisor,[2]

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[2]N.C.G.S. 95-78 through 95-84, Appendix pp. 16-18. The North Carolina Supreme Court decided that the pre-emption

and to deny to the employer the advantage of maintaining control and retaining the loyalty of his supervisors through the employer's dismissal powers. By withdrawing the right of an employer to freely fire his supervisor for union activity and membership, these statutes actually withdraw the primary control of an employer over his supervisors and force the employer one step closer to actually having to bargain with supervisors as though they were employees, in violation of 29 U.S.C. 164. In short, the statutes involved in the case at bar are inconsistent with the national labor policy of allowing employers to insure the loyalty of their supervisors in order to maintain a balance in the organization of bargaining between labor and management, and are in direct conflict with the Taft-Hartley Amendments.

The petitioners have argued that by the enactment of §14(b) of the Labor Management Relations Act, [29 U.S.C. §164(b)], Congress ceded to the states jurisdiction over the application of state right to work laws. In support of this contention, the petitioners have cited *Higgins v. Cardinal Mfg. Co.*, 360 P.2d 456 (Kan. S.Ct. 1961) *cert. den.*, 368 U.S. 829; *Algoma Plywood Co. v. Wis. Board*, 336 U.S. 301, 93 L.Ed. 691, 69 S.Ct. 584, 23 L.R.R.M. 2402 (1949); *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 84 S.Ct. 219, 11 L.Ed. 2d 179, 54 L.R.R.M. 2612 (1963). However, §14(b) only provides that states may prohibit agreements requiring membership in a labor

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doctrine applied to the present case, and therefore reserved the right to determine if necessary whether or not the statutes apply to supervisors. 282 N.C. 530, at p. 542 (Appendix to Petition for Writ of Certiorari, p. A18).

organization as a condition of employment. As has already been seen the present case does not involve a union-security agreement, nor does it involve the application of that portion of the statute prohibiting such an agreement. The cases cited by the petitioners certainly do involve application of §14(b) and contain decisions by this Court concerning the propriety of state prohibitions against union security agreements. However, while Congress very plainly made the decision to allow diverse rules concerning permissible union security agreements, §14(a) [29 U.S.C. 164(a)] which forbids compulsive bargaining with supervisors dispels any notion of Congressional intent to allow state jurisdiction over the relationship between an employer and his supervisor.

There are compelling practical reasons for this Court to hold that North Carolina is preempted from regulating the relationship between employers and supervisors. Such practical reasons were discussed at length by Mr. Justice Harlan in a different context in *Amalgamated Ass'n. of Street Ry. Employees v. Lockridge*, 403 U.S. 274, 29 L.Ed. 473, 91 S.Ct. 1909 (1971).

If state courts were allowed to administer their own laws restricting the conduct of an employer towards his supervisor, to include the hiring and firing of a supervisor, there must of necessity be some safeguard to insure compliance with the Taft-Hartley Amendments; and in particular, to prevent compulsive bargaining between an employer and supervisor. Unfortunately, review by certiorari is not sufficient to meet the problem, as noted by Justice Harlan in *Lockridge*, at 403 U.S., 289-290.

> Nor can we proceed on a case-by-case basis to determine whether each particular final juridical pronouncement does, or might reasonably be thought to, conflict in some relevant manner with

> federal labor policy. This Court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely police themselves in this regard.

Even were this Court to formulate a rule which is simple to apply for use in the regulation of an employer's relation with his supervisors, there would remain the diverse problems created by the application of this rule by different state courts unfamiliar with labor law and national labor law policy, utilizing their own local fact finding and law making procedure. As different procedural rules and unfamiliarity with national laws can easily produce the same diverse effects as separate state laws, this Court would again be faced with the problems of safeguarding national labor policy through the case-by-case certiorari procedure.

More importantly, the respondent employer in the present case is involved in interstate commerce. Congress very obviously sought to provide for comprehensive treatment of labor-management relations affecting several states. As Mr. Justice Harlan pointed out in *Lockridge* at 403 U.S., p. 286:

> [4.5] The course of events that eventuated in the enactment of a comprehensive national labor law, entrusted for its administration and development to a centralized, expert agency, as well as the very fact of that enactment itself, reveals that a primary factor in this development was the perceived incapacity of common-law courts and state legislatures, acting alone, to provide an informed and coherent basis for stabilizing labor relations conflict and for equitably and delicately structuring the balance of power among competing forces so as to further common good. . . .

The present situation involving supervisors participating in the union activity of rank and file employees deserves the application of uniform law even more than the situation involving a separate union of supervisors. The consequences of a union of employees and supervisors being subject to different regulations under state and federal law would inevitably exert a disruptive influence upon the administration and promulgation of labor relation policies of any employer engaged in interstate commerce and indeed must affect the very collective bargaining process which Congress sought to reserve to the National Labor Relations Board. Certainly the process of labor relations would be made immeasurably more difficult by the necessity of trying to formulate policies in such a way as to bargain with unions containing supervisors and employees under several state laws and federal substantive law. As ably noted by Mr. Justice Harlan in *Lockridge*, Congress sought to provide a uniformity through the Taft-Hartley Amendments and to provide uniform application of that law through the NLRB. The application of even simple guidelines concerning supervisory relations by state courts unfamiliar with national policy, utilizing diverse rules of procedure, while the NLRB retains jurisdiction over employees, would produce nothing less than chaos. Certainly the possibility of conflicting laws from state to state and within the same state between federal law applicable to employees and state law (or state courts and procedure) would impede the parties' willingness and ability to agree on terms resolving their dispute.

If this Court does decide that state courts are not preempted from controlling the relation between an employer and his supervisor, and the respondents contend that this Court should not so decide, then at the

very least the state courts should be limited to the application of uniform federal substantive law. Although this solution would not solve the problem of state courts with varying procedures applying an unfamiliar law, it would prevent the application of as many as fifty different state laws and the confusion which that would engender, the application of state law to supervisors and federal law to employees, and the denial to the employer of his primary method for retaining the loyalty of his supervisor and thus maintaining the power balance between the employer and the union.

CONCLUSION

Respondents respectfully submit that for the reasons discussed and cases cited herein the decision of the North Carolina Supreme Court that state courts are preempted from adjudicating a claim brought by supervisors against their employers for alleged discharge as a result of union membership should be sustained.

Respectfully submitted,

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JAN 8 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1597

ULYSSES VERNON BEASLEY, EMIDIO J. BASSETTI and JOE W. JONES,
Petitioners,

vs.

FOOD FAIR OF NORTH CAROLINA, INC. and RAY F. MESSICK,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MOTION OF ASSOCIATED INDUSTRIES, INC., CAPITAL ASSOCIATED INDUSTRIES, INC., CENTRAL PIEDMONT INDUSTRIES, INC., PIEDMONT ASSOCIATED INDUSTRIES, INC., and WESTERN CAROLINA INDUSTRIES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

and

BRIEF OF ASSOCIATED INDUSTRIES, INC., CAPITAL ASSOCIATED INDUSTRIES, INC., CENTRAL PIEDMONT INDUSTRIES, INC., PIEDMONT ASSOCIATED INDUSTRIES, INC., and WESTERN CAROLINA INDUSTRIES, INC., AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

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MOTION OF ASSOCIATED INDUSTRIES, INC., CAPITAL ASSOCIATED INDUSTRIES, INC., CENTRAL PIEDMONT INDUSTRIES, INC., PIEDMONT ASSOCIATED INDUSTRIES, INC., and WESTERN CAROLINA INDUSTRIES, INC., FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The following organizations are herein referred to as the "Associations":

Associated Industries, Inc.
Gastonia, North Carolina

Capital Associated Industries, Inc.
Raleigh, North Carolina

Central Piedmont Industries, Inc.
Charlotte, North Carolina

Piedmont Associated Industries, Inc.
Greensboro, North Carolina

Western Carolina Industries, Inc
Asheville, North Carolina

The Associations hereby respectfully move the Court for leave to file a brief as *amici curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. While the consent of Counsel for Respondents has been obtained, Counsel for Petitioners herein refused to consent to the filing of a brief by the Associations as *amici curiae*.

INTEREST OF THE ASSOCIATIONS

Each organization is an employer's association whose members are located in North Carolina. The number of employers who are members of each association and the number of employees employed by the members of each association are as follows:

Associated Industries, Inc., Gastonia, North Carolina
150 employers in North Carolina
60,000 employees (approximate)

Capital Associated Industries, Inc., Raleigh, North Carolina
375 employers in North Carolina
88,000 employees (approximate)

Central Piedmont Industries, Inc., Charlotte, North Carolina
231 employers in North Carolina
40,000 employees (approximate)

Piedmont Associated Industries, Inc., Greensboro, North Carolina
200 employers in North Carolina
150,000 employees (approximate)

Western Carolina Industries, Inc., Asheville, North Carolina
300 employers in North Carolina
100,000 employees (approximate)

The question presented in the instant case is a matter of continuing importance to the Associations.[1] Briefly stated, that question is whether individuals who are "supervisors" within the provisions of the National Labor Relations Act, as amended, are protected from discharge by their employers for involvement in union activities under a state's right-to-work laws, notwithstanding a federal labor policy which withholds such protection.

This matter is of significant national concern and of material import to the Associations' members. All of the Associations' members are subject to the national labor laws as well as the North Carolina Right-To-Work laws, and are directly affected by the substantial and far reaching consequences that the decision here may have on labor relations, not only in North Carolina, but also in the nineteen other states which have similar right-to-work provisions. Additionally, the brief of the Respondents herein argues that if the North Carolina Right-To-Work laws are not preempted by federal law, then, in the alternative, the Court must establish a federal substantive rule to resolve the conflict herein based on the common law of labor relations as recognized by prior decisions of the Court. The Associations have no reason to believe that the argument on this point will be expanded and be made complete in this Court. If this argument is approved by the Court the decision of the Supreme Court of the State of North Carolina must be affirmed. For these reasons, the Associations request this opportunity to present their views on the instant case to the Court.

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1. The Associations submitted a brief *amici curiae* to the North Carolina Supreme Court in its consideration of the case from which the present appeal is taken, *Beasley* v. *Food Fair of North Carolina, Inc.*, 282 N.C. 530, 193 S.E. 2d 911 (1973).

CONCLUSION

For the above-stated reasons, we respectfully urge the Court to grant this motion for leave to file the accompanying *amici curiae* brief in the present case in support of the position of the Respondents.

Respectfully submitted,

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January 4, 1974

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This *amici curiae* brief is filed by Associated Industries, Inc., Capital Associated Industries, Inc., Central Piedmont Industries, Inc., Piedmont Associated Industries, Inc., and Western Carolina Industries, Inc., ("Associations"), contingent upon the Court's granting the foregoing motion to file a brief as *amici curiae*.

INTEREST OF THE AMICI CURIAE

The interest of the Associations is set out on pp. 2-3, of the foregoing motion for leave to file a brief as *amici curiae*.

ARGUMENT

I.

North Carolina's Right-To-Work Law Imposes Sanctions upon an Employer Who Terminates a Supervisor Because of Activity in or on Behalf of a Union Organizational Drive. Congress Preempted This Area of Labor Relations Law.

The *Amici Curiae* have knowledge of and concur in Respondents' treatment of the preemption argument. Consequently, we feel that the preemption doctrine as developed by the Court in prior decisions and as presented in Respondents' brief on the merits is clearly dispositive of the issues presently before the Court.

Further, the *Amici Curiae* wish to point out for the Court that Petitioners' contention that there exists a state remedy for their discharge because of their activity on behalf of a union organizational drive which is not preempted by federal law, poses for an employer an impossible choice. If a state remedy is recognized herein, then an employer would, in effect, be forced to choose between terminating a supervisor thereby subjecting the employer to a multiplicity of state remedies, or retaining a supervisor who participates in union activity of rank and file employees, thus subjecting the employer to a violation of Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. § 158(a)(2)) for employer interference with the self-organizational rights of its employees. *H. J. Heinz Co.* v. *NLRB*, 311 U.S. 514. Congress certainly could not have comprehended such an impossible conflict for an employer by the enactment of Section 14(b) of the National Labor Relations Act (29 U.S.C. § 164(b)).

II.

Substantive Principles of Federal Labor Relations Law Reserving to an Employer Unfettered Control Over Union Activities of His Supervisors Are Paramount to Conflicting Doctrines of State Law Which Deprive Employers of Such Control.

A. Federal Common Law of Labor Relations Must Be Fashioned from Our National Labor Policies: The Lincoln Mills and Lucas Flour Decisions.

The Court, in *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448, recognized a federal common law of labor relations. This federal common law exists to judicially supplement statutory enactments with substantive rules so as to resolve situations where particular interpretations of state laws conflict with established federal policies, as in the instant case. *Lincoln Mills* involved enforcement of a collective bargaining contract under Section 301(a) of the Labor Management Relations Act.[1] Alabama's common law rule against enforcement of executory agreements to arbitrate labor contract provisions was contrary to a federal labor policy of enforcing such agreements. The Court resolved the conflict and concluded that "the substantive law to apply . . . is federal law, which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456. The Court, further explicating the source of the federal law, continued:

> The Labor Management Relations Act expressly furnishes some substantive law. . . . Other problems will lie in the penumbra of express statutory mandates.

1. 61 Stat. 156, 29 U.S.C. § 185. All citations to the U.S. Code are to the 1964 edition, unless otherwise indicated.

> Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. 353 U.S. at 457.

Subsequently, in a suit involving similar contract terms, the Court in *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, determined that "comprehensiveness" inheres in the *Lincoln Mills* mandate to formulate federal substantive rules to complement existing statutory provisions. Therefore, in suits involving conflicts between state and federal law, ". . . incompatible doctrines of local law must give way to principles of federal labor law." 369 U.S. at 102.

Section 14(a) of the Act, as amended,[2] provides:

> Sec. 14.(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining. 29 U.S.C. § 164(a).

Like Section 301, 14(a) expresses a federal policy. The federal policy established by Section 14(a) is that an employer is free to deal with his supervisors' union activities as he deems appropriate. This right to insist on the undivided loyalty of supervisors cannot be infringed upon by national or local laws.

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2. The National Labor Relations Act, as amended, is hereinafter cited as the "Act."

B. "Legislative Purpose" of Section 14(a) of the National Labor Relations Act Was to Insure That an Employer Could Command the Loyalty of His Supervisors.

The legislative history of Section 14(a) leaves little doubt as to "Congressional intent" to withhold both federal and state protection from those defined as "supervisors" under the Act (29 U.S.C. § 152(11)). An affirmative right in employers to freely control supervisors' union activities is legislated by Section 14(a).

The facts in this appeal present to the Court the same grave concerns which led Congress to enact the Taft-Hartley amendments[3] to the Act in 1947 as it pertains to "supervisors." Prior to 1947, the National Labor Relations Board's[4] policy was to exclude supervisory personnel from collective bargaining units which included employees subject to the supervision of those same supervisors. The basic reason for such a policy is that supervisors stand in a unique relationship with their subordinates in that the supervisor can easily coerce or intimidate his employees on the subject of unions. At the same time, however, the Board and Courts held that "supervisors" did enjoy some protection under the Act because Congress had not elected to exclude them from the definition of "employee." *See*, *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485.

Because of the immense potential for abuse of such an interpretation, Congress, in amending the Act in 1947, specifically excluded "supervisors" from all the protection afforded "employees." The legislative history surrounding

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3. Act of June 23, 1947, c. 120, Title I, § 101, 61 Stat. 151, *amending*, 29 U.S.C. § 164 (1946).

4. The National Labor Relations Board is hereinafter cited as the "Board."

these 1947 amendments to the Act indicates clearly that Congress intended to restrict supervisory personnel from participating in the union activities of rank-and-file employees. In House Report No. 245, 80th Congress, 1st Session, beginning at page 14, the following remarks[5] are representative of the Congressional feeling on the question of excluding foremen and other supervisory personnel from the definition of "employee."

> The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act to increase output of goods that move in the stream of commerce, and thus to increase its flow. It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, ... H. Rep. No. 245, 80th Cong., 1st Sess., p. 14.
>
> *Management, like labor, must have faithful agents.* If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then . . . there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for

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5. The *Amici Curiae* respectfully refer the Court to Respondents' brief on the merits for a more detailed exposition of the amendments' legislative history. We present herein only portions thereof particularly significant to Argument II.

it, and to carry on the whole of labor relations. *Id.* at 16.

* * *

The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. . . . What the bill does is to say what the law always has said . . . : That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom for any reason, he does not trust.

If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into unions that claim to be independent of the unions of the rank and file.* *Id.* at 15 (emphasis in original).

The intent of this legislative history is clear: Supervisors are expected to be loyal to management when a question of management loyalty versus union loyalty arises. Moreover, this same legislative history demonstrates clearly that Congress intended to establish a national policy concerning supervisors. The following comment, also from House Report No. 245, makes this Congressional intent even more concrete:

As under the present Act, the power of the Board under the amended Act in the matter of unfair labor practices is exclusive. This rule has necessitated a special provision . . . to give to the States a concurrent jurisdiction in respect of closed-shop and other union

> security arrangements. The rule of exclusive jurisdiction was developed many years ago by the Supreme Court in order to provide for uniformity in matters of national policy under the commerce clause. The Labor Act is an illustration of such a policy. *It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law. Moreover, the bill herewith reported very definitely states a national policy in respect of organization and collective bargaining by foremen.* H. Rep. No. 245, 80th Cong., 1st Sess., p. 40 (emphasis added).

The same theme is seen in the Senate Report on the 1947 Taft-Hartley amendments. In speaking of the major changes resulting from the amendments to the Act, the Senate Report No. 105, 80th Congress, 1st Session, outlines the effect of the number one change:

> 1. It eliminates the genuine supervisor from the coverage of the Act as an employee and makes it clear that he should be deemed a part of management. S. Rep. No. 105, 80th Cong., 1st Sess., p. 3.
>
> * * *
>
> In other words, the bill does not prevent anyone from organizing nor does it prohibit any employer from recognizing a union of foremen. It merely relieves employers who are subject to the national Act free from any compulsion by this National Board or *any local agency* to accord to the front line of management the anomalous status of employees. *Id.* at 5 (emphasis added).

The facts of the instant case must be viewed with this Senate Report language in mind. Food Fair is subject to

the National Labor Relations Act; the Petitioners were supervisors within the meaning of the Act; these supervisors were engaged in organizational activity of the rank-and-file employees; and, it is contrary to a substantial national policy for a Federal or State agency to compel Respondents to treat these supervisors as employees when they engage in organizational activity. Yet, that is precisely what Petitioners would require of Respondents, directly in contravention of the above quoted language.

In certain situations, an employer clearly violates federal law by discharging a supervisor. When a supervisor refuses to engage in *unlawful* activity on behalf of an employer during a union campaign, the employer violates the Act by firing him. *See, e.g., Dewey Brothers, Inc.*, 187 NLRB No. 17, 76 LRRM 1074, *enf'd*, 80 LRRM 2112 (4th Cir. 1972); *NLRB* v. *Lowe dba Thermorite Mfg. Co.*, 406 F.2d 1033 (6th Cir. 1969). A supervisor is protected from adverse actions by his employer where he voluntarily gives a statement to a Board agent during the investigation and preparation of an unfair labor practice case. *Electro Motive Mfg. Co.* v. *NLRB*, 389 F.2d 61 (4th Cir. 1968). On the other hand, it is axiomatic that the discharge or demotion of a supervisor merely because of his union activities is not a violation of the Act. *See, e.g., NLRB* v. *Inter-City Advertising Co.*, 190 F.2d 420 (4th Cir. 1951), *cert. den.*, 342 U.S. 908 (1952); *NLRB* v. *Big Three Welding Equipment Co.*, 359 F.2d 77 (5th Cir. 1966). It, therefore, is clear that in this area of supervisors, Congress has prohibited certain actions by an employer against a supervisor, whereas in other areas an employer is protected. Specifically, in Section 14(a), Congress unequivocally stated that no law—either national *or local*—could compel an employer to deem individuals [or for that

matter, "persons," as the North Carolina Right-To-Work Law[6] is written] who are "supervisors" to be "employees."

Congress granted supervisors the right to become union members in Section 14(a). However, Section 14(a) does not detract from the undivided loyalty supervisors owe to their employer under Section 8(b)(1)(B)[7] of the Act as well as Section 2(3)[8] which excludes "supervisors" from the statutory definition of "employee" and Section 2(11)[9] which defines the extent of a supervisor's authority.

Section 8(b)(1)(B) of the Act prohibits union coercion or restraint of supervisory personnel for supervisory or managerial acts performed by them. *Local 81, Amalgamated Meat Cutters and Butcher Workmen* v. *NLRB*, 458

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6. N. C. GEN. STAT. § 95-78. Declaration of public policy.—The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of *persons* to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association. (emphasis added) *See also*, N. C. GEN. STAT. §§ 95-79 through 95-83 for similar provisions using the term "persons."

7. 29 U.S.C. § 158(b)(1)(B) provides:

(b) It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; . . . .

8. 29 U.S.C. § 152(3) provides, *inter alia*:

(3) The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . . .

9. 29 U.S.C. § 152(11) provides:

(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

F.2d 794 (D.C. Cir. 1972). This section of the Act was passed because Congress felt that a supervisor's absolute duties, responsibilities and obligations in the performance of managerial and supervisory acts to his employer could not be detracted from by his membership in a union. The Ninth Circuit Court of Appeals has held that it is clear from the history of the 1947 Taft-Hartley amendments to the Act that Congress intended to restore to the employers the right and power to insist upon the undivided loyalty of their supervisory personnel. *Texas Co.* v. *NLRB*, 198 F.2d 540 (9th Cir. 1952). *See also, NLRB* v. *Toledo Locals Nos. 15-P and 272, Lithographers and Photo-Engravers International Union*, 437 F.2d 55 (6th Cir. 1971), where the Court concluded that supervisory personnel must not be restrained in any way from performing duties which the employer required them to perform.

The legislative history noted above, and the cases cited herein, point out the dilemma which faced Congress in 1947, *i.e.*, whether to protect supervisors who engage in union activity, or whether to grant to employers the unfettered right to insist on their loyalty. Congress concluded that supervisors should not be protected because to do so would lead to an employer either having to replace its supervisors who become aligned with its rank-and-file employees, or to face *de facto* nonrepresentation by its supervisors. *See, San Francisco-Oakland Mailers' Union No. 18, International Typographical Union*, 172 NLRB No. 252, 69 LRRM 1157 (1968).

C. North Carolina's Right-To-Work Law Cannot Be Construed So As to Frustrate the Established Federal Policy of Section 14(a).

North Carolina's Right-To-Work statute became state law prior to the effective date of the Taft-Hartley amendments to the Act. Section 14(b) of the Act enables states to enact laws prohibiting union-management contracts that require as a condition of employment present or future membership in a labor union or the payment of union dues. Section 14(b) provides:

> (b) Nothing in this [Act] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law. 29 U.S.C. § 164(b).

Such an express grant of jurisdiction and authority by Congress is not a license for a state to thereby override other national policies which may be more paramount to the smooth functioning of a nationwide labor policy. The Court in *Local 1625, Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, recognized limitations on the extent of a state right-to-work law. *Schermerhorn* reaffirmed earlier cases which held that where the object of picketing was to *obtain* a union security clause, the picketing cannot be enjoined as a violation of a state right-to-work law. "[S]tate power, recognized by § 14(b), begins *only with actual negotiation and execution of the type of agreement described by § 14(b).*" 375 U.S. at 105 (emphasis by the Court). The Court through its own statutory construction thus delineated one parameter of right-to-work laws. The Court should delineate here a rule that will correct Petitioners' overbroad interpretation of the right-to-work laws

of North Carolina. The Court would thereby protect an equally important national policy of ensuring to an employer control over his supervisors' union activities.

There are many Supreme Court decisions which have rejected various impositions of state laws, generally involving legitimate state interests, on a federal statutory policy. The Court in selecting the source of the governing law has historically considered three general factors: *first,* and most importantly, federal policy as reflected in statutory phraseology and in legislative history; *second,* the particular interest of the state in the activity regulated by federal law; *third,* protection of the participants in the regulated activity—labor and management in the instant case—from competing systems of primary law.

For example, before the enactments of both the North Carolina Right-To-Work Law and the Taft-Hartley amendments in 1947, the Court in 1944 encountered a factual situation very similar to the present case in *NLRB* v. *Hearst Publications, Inc.,* 322 U.S. 111. The publishing company refused to bargain collectively with a union representing newsboys contending that it was not required to bargain because the newsboys were not "employees" within the purview of the National Labor Relations Act.[10] The company asserted that the newsboys were "independent contractors" according to California's common law standards which it contended should determine the applicability of the federal statute's protective provisions. The Court recognized a need for uniformity in this area of labor relations and thus concluded that to allow a state to determine which citizens within its borders qualify for protection under a federal statute:

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10. Act of July 5, 1935, c. 372, § 2, 49 Stat. 450, *as amended,* 29 U.S.C. § 152(3) (1964).

> . . . would introduce variations into the statute's operation as wide as the differences the forty-eight states and other local jurisdictions make in applying the distinction for wholly different purposes. Persons who might be "employees" in one state would be "independent contractors" in another. They would be within or without the statute's protection depending not on whether their situation falls factually within the ambit Congress had in mind, but upon the accidents of the location of their work and the attitude of the particular local jurisdiction in casting doubtful cases one way or the other. Persons working across state lines might fall in one class or the other, possibly both, depending on whether the Board and the courts would be required to give effect to the law of one state or of the adjoining one, or to that of each in relation to the portion of the work done within its borders. 322 U.S. at 123. (emphasis added).

The Court's reasoning in the *Hearst* decision clearly applies to the present appeal. Analogously, if one right-to-work state, *e.g.*, Virginia, interprets its state law to *exclude* supervisors from its statutory term "persons" in conformity with the national labor policy one can easily imagine the very real conflicts which could result affecting the great mass of commerce between the two states, North Carolina and Virginia, if Petitioners' interpretation of North Carolina's statute is allowed. Two supervisors with the same company at different plants, one located in each state, would have substantially different employment rights with the same employer. Certainly Congress did not intend such an inequitable patchwork plan from its enactment of Sections 14(a) and 14(b). The broad solution which Congress intended by excluding "supervisors"

from the Act is clearly frustrated if large numbers of supervisors are protected in one state and not in another.

Rutherford Food Corp. v. *McComb*, 331 U.S. 722, involved the same definitional problem as the *Hearst* decision; *i.e.*, whether a particular worker (meat boner) was an "employee" within the terms of the Fair Labor Standards Act[11] or an "independent contractor." The Act requires that certain records be kept by employers concerning wages and overtime[12] if the workers are included within the Act's definition of "employee." The Court again rejected the Petitioner's proposed solution of allowing the common law of the various states to restrict the statutory provisions which defined "employee." The Court appropriately observed that "putting on a(n) . . . label . . ." (331 U.S. at 729) according to a state's common law standards does not alter the protection and operation of the Fair Labor Standards Act because to do so would limit the Act's scope contrary to Congress' intent. Similarly, the label "persons" in North Carolina's Right-To-Work Law cannot be construed to alter the operation of Section 14(a) of the National Labor Relations Act which extends protection to employers in exercising unrestricted control over their supervisors' union activities.

In yet another important area of federal law, the Court has demonstrated that local conceptions of legal relationships between an unincorporated association, its shareholders and outsiders for other purposes cannot be allowed to limit the operation of the federal taxing authority. *Burk-Waggoner Oil Association* v. *Hopkins*, 269 U.S. 110, involved the imposition of the corporate tax rate by the federal government on earnings of an organization which

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11. 52 Stat. 1060, 29 U.S.C. § 203(e).

12. 29 U.S.C. § 207.

constituted a partnership under Texas law. Under the state law the partnership was not a legal entity; consequently, the partners were liable for its debts and it could not hold property in its own name. The association contended that the tax invaded the state's power to regulate the ownership of property within its borders. The Court recognized the importance of freeing a federal scheme of taxation from the vagaries of the various states' laws and held:

> It is true that Congress cannot convert into a corporation an organization which by the law of its state is deemed to be a partnership. But nothing . . . precludes Congress from taxing as a corporation an association which although unincorporated, transacts its business as if it were incorporated . . . . Neither the conception of unincorporated associations prevailing under the local law, nor the relations under that law of the association to its shareholders, nor their relation to each other and to outsiders, is of legal significance as bearing upon the power of Congress to determine how and at what rate the income of the joint enterprise shall be taxed. 269 U.S. at 114.

Similarly, Respondent agrees that Petitioners' concept of "persons" under N.C.G.S. 95-78 *et seq.* for many state purposes may legitimately include those individuals whom the Act defines as "supervisors." However, to allow such a concept to hamstring a federal scheme of labor relations which clearly comprehends an employer's right to discharge a supervisor for his own, as well as rank-and-file, union activities, completely ignores the importance which Congress attached to Section 14(a) of the Act. *See also, Burnet* v. *Harmel,* 287 U.S. 103 at 110, where the property status of an oil lease under state law was rejected for federal tax purposes.

In 1949, California sought to apply its community property rule that a wife has one-half interest in her husband's life insurance if the premiums come out of community property (his earnings). The state law, as applied, was in derogation of a federal statutory policy that soldiers have an absolute right to select beneficiaries of their federal life insurance policies. The Court, in *Wissner* v. *Wissner,* 338 U.S. 655, held that the California rule would directly have undercut Congressional intent with respect to the federal government's nationwide insurance program. The Court, of course, did not invalidate California's community property law but held that on this particular conflict with federal law, the otherwise valid state law must give way to federal policy. Likewise, North Carolina's Right-To-Work laws, as construed by Petitioners, would undermine the management-labor bargaining balance struck by Congress in the national labor laws by protecting supervisors who "swap sides" in clear contravention of legislative intent of the 1947 Taft-Hartley amendments. It is significant that Petitioners have not demonstrated a single *compelling* state interest which North Carolina may have in construing the statutes as Petitioners urge. In the absence of such an interest, federal policy must have deference.

DeSylva v. *Ballentine,* 351 U.S. 570, involved a federal statute, The Copyright Act of 1947,[13] which extended renewal rights of a deceased author to his "widow, widower, or children."[14] The case involved an author who, having secured original copyrights on numerous musical compositions, died before the time for renewal arose. He was survived by his widow and one illegitimate child. The

13. 61 Stat. 652, 17 U.S.C. § 1, *et seq.*

14. 17 U.S.C. § 24.

questions before the Court were whether an illegitimate child was included within the term "children" and which body of law, state or federal, would resolve the issue. The Court decided that the general scheme of the federal statute contemplated reliance on state law for definition of not only the term "children" but also the author's other legal relations, *e.g.*, widow, widower, next of kin and executor. Consequently, the Court decided that the term "children" in the federal statute would be controlled by state law.

> The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. (citations omitted). This is especially true where a statute deals with a familial relationship; *there is no federal law of domestic relations, which is primarily a matter of state concern.* 351 U.S. at 580 (emphasis added).

Significantly, the determinative factors the Court relied upon in *DeSylva* are absent in the present appeal. *First*, in contrast to the absence of a federal law of domestic relations as in *DeSylva*, there does exist a substantial body of federal labor relations law, both statutory and common law, from which the Court can formulate a governing rule for the instant appeal. The national labor laws, given substance and vitality by decisions of the Court, clearly distinguish between a "supervisor" and "employee."[15] The states in exercising their constitutional and congressionally ceded legislative powers, must respect that distinction which Congress has deemed so important. *Second*, in considerable contrast to domestic relations being primarily of state concern, both the legal relation-

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15. 29 U.S.C. § 152(3), (11); 29 U.S.C. § 164(a).

ships and economic responsibilities of supervisory personnel are so inextricably intertwined with interstate commerce, that the parameters of the present appeal extend beyond North Carolina's borders to sister jurisdictions which may or may not have comparable and compatible right-to-work laws. Consequently, at the very least, the "supervisory" aspect of labor law is "primarily" of national concern. States clearly retain control in such areas as public health and safety or protection of person or property. *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131; *UAW* v. *Wisconsin Employment Relations Board*, 351 U.S. 266; *United Construction Workers* v. *Laburnum Construction Co.*, 347 U.S. 656. In the absence of these primary state concerns, however, diverse state policies should not shape the content of federal law by exception or definition. Therefore, the federal policy embodied in Section 14(a) cannot be abridged by a state law, within its own territory, in the absence of a very compelling state interest.

For the Court to allow Petitoners' interpretation of North Carolina's Right-To-Work Law to supersede, at least in practical importance, the federal policy of Section 14(a) would have significant and unsettling ramifications not only in North Carolina but also in nineteen other states which presently have such laws or constitutional amendments, as well as the remaining jurisdictions without such laws. First of all, Petitioners' interpretation would create the type of situation that existed in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, which the Taft-Hartley amendments' passage was intended to correct. Mr. Justice Douglas, in dissenting in *Packard*, noted that even a "union of vice-presidents" would be entitled to protection under the then existing interpretation of the Act. 330 U.S. at 494. If Petitioners' interpretation of the North Carolina Right-To-Work Law is approved in the present appeal, the

only practical difference from the *Packard* result would be that state law, rather than federal law, would be the foundation for "such a basic change in industrial philosophy." 330 U.S. at 495. To accomplish by indirection what has been specifically forbidden to be accomplished by direction is a process repugnant to American jurisprudence.

More importantly, this matter of supervisors' involvement in union activities of the rank-and-file employees is peculiarly one that calls for uniform law. The possible consequences of supervisors' union membership having different meanings under state and federal law would inevitably exert a disruptive influence upon both the promulgation and administration of industrial relations policies upon employers engaged in interstate commerce. Because none of the parties—the supervisors, employer, employees or union—could be certain of the rights, responsibilities and obligations possessed by each, the process of labor relations would be made immeasurably more difficult by the necessity of trying to formulate policies in such a way as to contain the same meaning under as many as 50 state laws and federal substantive laws, all of which might one day be invoked in enforcing collective bargaining contracts. If Petitioners' interpretation is approved, and if a collective bargaining agreement is signed by an interstate commerce employer with operations in states other than North Carolina, the possibility of conflicting substantive interpretations pertaining to supervisors under competing laws will very likely lead to prolonged labor disputes. As the Court has said in another area of labor law where conflicts existed between state and federal law:

> Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

> The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95 at 104.

In closing, a quote by Mr. Justice Frankfurter, speaking in dissent about federal-state accommodation in a labor setting, is appropriate:

> We are in the domain of government and practical affairs, and this Court has not stifled State action, unless what the State has required, in the light of what Congress has ordered, would *truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden. Hill* v. *Florida ex. rel. Watson*, 325 U.S. 538, 552 (1945) (emphasis added).

We submit that Petitioners' interpretation of North Carolina's Right-To-Work Law would "entail contradictory duties" for supervisors and employers alike and "make actual, not argumentative, inroads on what Congress has commanded. . ." in Section 14(a). Therefore, we urge the Court to formulate a rule according to the common law of labor relations as it did in the *Lincoln Mills* and *Lucas Flour* decisions to substantiate the unequivocal Congressional purpose of guaranteeing to employers complete control over their supervisors' union activities and thereby resolve the present federal-state statutory conflict.

CONCLUSION

For the reasons stated herein, as well as those arguments and authorities raised by Respondents, it is urged that the Court affirm the decision of the Supreme Court of the State of North Carolina.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the foregoing Amici Curiae Brief on all parties required to be served by enclosing a true copy of same in a postpaid, properly addressed envelope, which was deposited in the United States Mail as follows:

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JAMES M. MILES

SUPREME COURT, U. S.

Supreme Court, U. S.
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JAN 17 1974
MICHAEL RODAK, JR., CLERK

No. 72-1597

In the Supreme Court of the United States

OCTOBER TERM, 1973

ULYSSES VERNON BEASLEY, ET AL., PETITIONERS

v.

FOOD FAIR OF NORTH CAROLINA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1597

ULYSSES VERNON BEASLEY, ET AL., PETITIONERS

v.

FOOD FAIR OF NORTH CAROLINA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

This case involves the question whether the National Labor Relations Act preempts a state court suit for damages brought by supervisors against their employer under a state right-to-work law based on their discharge for union activity. The National Labor Relations Board, which is charged with the responsibility for administering the National Labor Relations Act, believes that permitting such a suit would impair Congress' objective in removing supervisors from the Act's protection, and accordingly that the suit is preempted.

530-320—74——1

STATEMENT

Petitioners were meat market managers employed by the respondent Food Fair of North Carolina (the "Company") at its Winston-Salem stores. In the Spring of 1971, Local Union No. 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO (the "Union") began an organizing campaign among the meat department employees at those stores, and the petitioners signed union membership cards. Pursuant to the Union's request, the Board ordered that a representation election be held. The Board found that the meat market managers were "supervisors" and excluded them from the bargaining unit. The Union won the election, and was certified as the bargaining representative of the meat department employees. A few days later, the petitioners were discharged by respondent Messick, president of the Company (A. 2, 9–12).[1]

The Union filed charges with the Board alleging that the discharge of the petitioners was an unfair labor practice, in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). The Regional Director dismissed the charges, and the Union appealed to the General Counsel of the Board. The General Counsel denied the appeal on the ground that petitioners were "supervisors" (Section 2(11), 29 U.S.C. 152(11)), and hence not entitled to the protection of the Act (A. 4–5, 13).

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[1] "A." refers to the appendix to the briefs; "Pet. App." refers to the appendix to the petition.

Meanwhile, the petitioners filed suit in the Forsyth County Superior Court of North Carolina, alleging that their discharge for support of and membership in the Union violated the North Carolina Right-to-Work Law, G.S. 95–78, *et seq.*[2] They sought $300,000 in actual damages, and $1,000,000 in punitive damages[3] (A. 2–3). The trial court found that the petitioners failed to state a claim upon which relief could be granted and entered summary judgment for the Company (A. 14–15).

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[2] The North Carolina General Statutes provide, in relevant part, as follows:

"Section 95–78. *Declaration of public policy.*—The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association" (A. 16).

* * * * *

"Section 95–81. *Nonmembership as condition of employment prohibited.*—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment" (A. 17).

[3] Section 95–83 of the North Carolina General Statutes provides:

"*Recovery of damages by persons denied employment.*—Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 95–80, 95–81, and 95–82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment" (A. 17–18).

The North Carolina Court of Appeals reversed, holding that, since "the activities of supervisors could not be arguably either prohibited or protected under the [National Labor Relations] Act," state courts were not preempted from regulating those activities. The court further ruled that supervisors were "persons" within the meaning of the state Right-to-Work Law, notwithstanding that this conclusion would "seriously weaken the position of management, and create a severe imbalance between labor and management" (A. 28–29).

The Supreme Court of North Carolina reversed, holding that the suit is preempted (Pet. App. A1–A18). The court noted that the 1947 amendments to the National Labor Relations Act removed supervisors from the definition of "employee," and that, as a result, the "federal courts have consistently held that a supervisor is not protected under the statute from discharge due to union membership or activity" (Pet. App. A9).[4] These federal cases, the North Carolina Supreme Court added, "recognize the existence of the legislative intent on the part of Congress to leave employers unfettered in dealing with union affiliation

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[4] The supreme court cited, *inter alia: National Labor Relations Board* v. *Big Three Welding Equipment Co.*, 359 F. 2d 77 (C.A. 5); *National Labor Relations Board* v. *Charley Toppino and Sons, Inc.*, 332 F. 2d 85 (C.A. 5); *Oil City Brass Works* v. *National Labor Relations Board*, 357 F. 2d 466 (C.A. 5); *National Labor Relations Board* v. *Griggs Equipment, Inc.*, 307 F. 2d 275 (C.A. 5); *National Labor Relations Board* v. *Fullerton Publishing Company*, 283 F. 2d 545 (C.A. 9); *National Labor Relations Board* v. *Inter-City Advertising Co.*, 190 F. 2d 420 (C.A. 4), certiorari denied, 342 U.S. 908.

on the part of their supervisory personnel" (Pet. App. A10). On the preemption question, the North Carolina Supreme Court recognized that, in addition to conduct arguably protected or prohibited by the National Labor Relations Act, "legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation" (Pet. App. A13; quoting *Hanna Mining Co.* v. *District 2, Marine Engineers,* 382 U.S. 181, 187). The North Carolina Supreme Court concluded (Pet. App. A17):

> To permit a state law to deprive an employer of his right to discharge his supervisor for membership in a union would completely frustrate the congressional determination to leave this weapon of self-help to the employer. Furthermore, the balance of power between labor and management expressed in our national labor policy would be upset. * * *

DISCUSSION

1. In the 1947 amendments to the National Labor Relations Act, Congress removed supervisors from the Act's definition of "employee."[5] Moreover, it provided in Section 14(a) that:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any

[5] See Sections 2(3) and 2(11), 29 U.S.C. 152(3) and (11) (A. 18–19).

> law, either national or local, relating to collective bargaining.

These amendments were designed to provide a solution to the conflict-of-loyalty problem created by the unionization of supervisors. Supervisors were free to join unions and to bargain through them if the employer was willing; on the other hand, the employer could insist that his supervisors not join unions and discharge them if they did.

Thus, the House Report states:

> The evidence before the committee shows clearly that unionizing supervisors under the Labor Act * * * is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize * * * they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them. * * *
>
> * * * * * *
>
> The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. * * * What the bill does is to say * * * [t]hat no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust. [H. Rep. No. 245, 80th Cong., 1st Sess., pp. 14, 17, 1 Leg. Hist. of the Labor Management Relations Act, 1947 ("Leg. Hist.") 305, 308.]

Similarly, the Senate Report states:

> [T]he bill does not prevent anyone from organizing nor does it prohibit any employer from

> recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees. [S. Rep. No. 105, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. 411.]

During the Senate debate, Senator Taft added:

> The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act.
>
> * * * The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States. [93 Cong. Rec. 3836, 2 Leg. Hist. 1008–1009.]

Accordingly, as the North Carolina Supreme Court recognized (*supra,* p. 4), the federal courts have consistently held that the National Labor Relations Act affords no protection to supervisors who have been discharged for union activity. Congress intended, in enacting the 1947 amendments, that "employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities." *National Labor Relations Board* v. *Edward*

G. Budd Mfg. Co., 169 F. 2d 571, 579 (C.A. 6), certiorari denied, 335 U.S. 908. See also *Carpenters District Council, etc.* v. *National Labor Relations Board*, 274 F. 2d 564, 566 (C.A.D.C.).[6]

2. In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245, this Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." In *Teamsters Union* v. *Morton*, 377 U.S. 252, 258, this Court added that, even where the "activity here involved was neither protected nor prohibited, it is still necessary to determine whether * * * 'Congress occupied this field and closed it to state regulation' ". The answer to this question, the Court said (*ibid.*), "ultimately depends upon whether the applica-

[6] However, if the discharge of a supervisor is likely to deter organizational activity by rank-and-file employees, the discharge, because of its interference with the statutory rights of the latter, would violate Section 8(a)(1) of the Act, 29 U.S.C. 158 (a)(1), and the Board would be empowered to order the supervisor reinstated with back pay. See *National Labor Relations Board* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 (C.A. 5); *National Labor Relations Board* v. *Better Monkey Grip Co.*, 243 F. 2d 836 (C.A. 5), certiorari denied, 355 U.S. 864; *National Labor Relations Board* v. *Leas & McVitty, Inc.*, 384 F. 2d 165, 166 (C.A. 4). Cf. *John Hancock Mutual Life Ins. Co.* v. *National Labor Relations Board*, 191 F. 2d 483 (C.A.D.C.). This was the theory of the unfair labor practice charges which were filed in this case, but, after investigation, those charges were dismissed by the Regional Director, and the dismissal was sustained by the General Counsel (*supra*, p. 2).

tion of state law * * * would operate to frustrate the purpose of the federal legislation."

We believe that the North Carolina Supreme Court correctly concluded that to permit a supervisor who has been discharged by his employer for union activity to recover damages against the employer in a state court suit "would operate to frustrate the purpose of the federal legislation" (*Morton, supra*). "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Garmon, supra*, 359 U.S. at 247. The threat of a state court damage action would tend to deter an employer from exercising his right, which Congress restored in 1947, to insist that his supervisors not join unions or engage in union activity.

Petitioners contend (Br. 12), however, that, while the National Labor Relations Act does not protect supervisors from discharge for union membership, a state remedy for such discharge is permitted by Section 14(a) of the Act. That Section provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem * * * supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." Petitioners argue that, since "they do not seek the right to collectively bargain with their employer but simply a remedy for their discharge" (Br. 12), their suit under the North Carolina Right-to-Work Law is not

barred by Section 14(a). This contention does not withstand analysis.

The legislative history of Section 14(a) shows that Congress intended to prescribe a uniform national policy respecting not only collective bargaining by supervisors, but also their organizing into unions, and therefore withdrew not only federal, but any state, protection for both activities.

Thus, the House Report stated:

> It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law. * * * [T]he bill herewith reported very definitely states a national policy in respect of organization and collective bargaining by foremen. [H. Rep. No. 245, *supra,* p. 40, 1 Leg. Hist. 331.]

The Senate Report stated, with reference to Section 14(a):

> * * * it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity. [S. Rep. No. 105, *supra,* p. 28, 1 Leg. Hist. 434.] [7]

It would be contrary to this congressional policy to permit supervisors to recover damages under state

[7] See also H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 60, 1 Leg. Hist. 564.

law because the employer, exercising his right under the National Labor Relations Act, has discharged them on account of their union membership.[8]

3. *Hanna Mining Co.* v. *District 2, Marine Engineers,* 382 U.S. 181 (Br. 9–11) does not require a contrary conclusion. In that case, the Court held that the National Labor Relations Act did not preclude a Wisconsin state court from enjoining picketing by a union to obtain representation rights on behalf of supervisors. The Court noted that "activity designed to secure organization or recognition of supervisors cannot be protected by §7 of the Act, arguably or otherwise" (382 U.S. at 188), and it found that there was no basis for believing that the picketing "exerted secondary pressure arguably violating §8(b)(4)(B)" (*id.* at 191). The Court rejected the contention that the language in Section 14(a) (*supra,* p. 9) to the effect that supervisors were not prohibited from becoming union members signified "a federal policy of *laissezfaire* toward supervisors ousting state as well as Board authority * * *" (382 U.S. at 189). "This broad argument fails utterly in light of the legislative his-

[8] Congress' action in withdrawing from supervisors the statutory protection against employer discharge for joining a union which was previously accorded presents no constitutional question. While the right of freedom of association encompasses the right to join a union, the Constitution merely protects those rights against governmental, not employer, interference. Restoring supervisors to the position they had, in relation to the employer, prior to the enactment of the Wagner Act does not constitute governmental abridgement of their right of freedom of association. *National Labor Relations Board* v. *Edward G. Budd Mfg. Co., supra,* 169 F. 2d at 577.

tory, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees" (*ibid.*).

Thus, the state court was free to enjoin the picketing in *Hanna*, not merely because the picketing was neither arguably protected nor arguably prohibited by the National Labor Relations Act, but because, in addition, such restraint was consistent with national labor policy. The objective of the picketing in *Hanna* was to pressure the employer to recognize and bargain with a union for supervisors. This was contrary to the national labor policy of leaving employers free from federal, as well as state, compulsion to recognize and bargain with a supervisors' union. The state court injunction, therefore, furthered that policy by relieving the employer of such union pressure.

In contrast, the relief sought from the state court here would be in derogation of national labor policy. For, as a practical matter, it would "deprive an employer of his right to discharge his supervisor for membership in a union" and thereby "frustrate the congressional determination to leave this weapon of self-help to the employer" (Pet. App. A17). Nothing in *Hanna* sanctions the exercise of state power which would so undermine the federal regulatory scheme.

4. Contrary to petitioners' contention (Br. 13–17), Section 14(b) does not authorize the state court to assert jurisdiction in this case. That section provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 14(b) "was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements." *Retail Clerks Ass'n* v. *Schermerhorn,* 373 U.S. 746, 751. It was intended "to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law." H. Conf. Rep. No. 510, *supra,* p. 60, 1 Leg. Hist. 564.

Thus, Section 14(b) creates an exception to preemption of state regulation in relation to union security agreements. It does not, however, permit the states to regulate other union activity. For example, in *National Labor Relations Board* v. *Houston Chapter, Assoc. Gen'l Contractors of America, Inc.,* 349 F. 2d 449, 453, certiorari denied, 382 U.S. 1026, the Fifth Circuit concluded that Section 14(b) did not permit the state to outlaw an exclusive hiring hall arrangement. Similarly in *Sea Pak* v. *National Maritime Union,* 400 U.S. 985, affirming, 423 F. 2d 1229 (C.A. 5), this Court summarily affirmed a lower court decision holding that Section 14(b) did not authorize the state to regulate checkoff arrangements. Accord-

ingly, since no union security agreement is involved, Section 14(b) would afford no basis for the exercise of state authority here.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted.

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Solicitor General.

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JANUARY 1974.

Syllabus

BEASLEY ET AL. *v.* FOOD FAIR OF NORTH CAROLINA, INC., ET AL.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 72–1597. Argued February 19, 1974—Decided May 15, 1974

Following discharge of petitioners, managers of meat departments in respondent Food Fair's stores, because of their union membership, the union filed unfair labor practice charges with the National Labor Relations Board, which were dismissed on the ground that the protection of the National Labor Relations Act (NLRA) did not extend to "supervisors" like petitioners. Thereupon petitioners brought suit in state court, under § 95–83 of North Carolina's Right-to-Work law. The trial court granted respondents' motion for summary judgment. On the ground that enforcing the state law in favor of petitioners was barred by the second clause of § 14 (a) of the NLRA ("no employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining"), the State Supreme Court ultimately upheld that ruling. *Held:* The second clause of § 14 (a) applies to any law requiring an employer to accord to supervisors like petitioners, who are "the front line of management," the "anomalous status of employees," and enforcement of the North Carolina law would thus flout the national policy against compulsion upon employers from either federal or state authorities to treat supervisors as employees. Pp. 656–662.

282 N. C. 530, 193 S. E. 2d 911, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Larry L. Eubanks argued the cause and filed a brief for petitioners.

Ralph M. Stockton, Jr., argued the cause for respondents. With him on the brief were *J. Robert Elster* and *James H. Kelly, Jr.**

*Briefs of *amici curiae* urging affirmance were filed by *Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin,* and

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Taft-Hartley amendments[1] of the National Labor Relations Act excluded supervisors from the protections of the Act and thus freed employers to discharge supervisors without violating the Act's restraints against

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Norton J. Come for the National Labor Relations Board, and by *James M. Miles* for Associated Industries, Inc., et al.

[1] Labor Management Relations Act, 1947, c. 120, 61 Stat. 136. The three amendments relevant to this case provide:

§ 2 (3). "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined." 61 Stat. 137, 29 U. S. C. § 152 (3).

§ 2 (11). "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." 61 Stat. 138, 29 U. S. C. § 152 (11).

§ 14 (a) "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." 61 Stat. 151, 29 U. S. C. § 164 (a).

discharges on account of labor union membership. The question in this case is whether those amendments also freed the employer from liability in damages to the discharged supervisors under §§ 95–81 and 95–83 of North Carolina's Right-to-Work law that provides such an action for employees discharged for union membership.[2]

Respondent Food Fair of North Carolina, Inc. (Food Fair), a grocery chain, operates stores throughout North Carolina. Petitioners were managers of meat departments in Food Fair Stores in the Winston-Salem area. When Local 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, organized the stores' meatcutters, petitioners also joined the union. Food Fair discharged them, allegedly on account of their union membership, immediately after Local 525 won a representation election conducted by the National Labor Relations Board. The Local claimed that the discharges constituted an unfair labor practice and filed charges with the Regional Director of the NLRB. The Regional Director refused to issue a complaint on the ground that petitioners were "supervisors" excluded from the Act's protection. On appeal, the NLRB General

[2] Those sections provide:

"§ 95–81. Nonmembership as condition of employment prohibited.—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment." N. C. Gen. Stat. § 95–81 (1965).

"§ 95–83. Recovery of damages by persons denied employment.—Any person who may be denied employment or be deprived of continuation of his employment in violation of §§ 95–80, 95–81 and 95–82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment." N. C. Gen. Stat. § 95–83 (1965).

Counsel refused to issue a complaint, on the same ground.[3] Petitioners thereupon brought this suit in state court against Food Fair under § 95–83. Food Fair contended successfully that the second clause of § 14 (a) of the National Labor Relations Act, 29 U. S. C. § 164 (a)—"but no employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining"—prohibited enforcement of the state law in favor of supervisors, and was granted summary judgment. The North Carolina Court of Appeals reversed in reliance upon *Hanna Mining* v. *Marine Engineers*, 382 U. S. 181 (1965). 15 N. C. App. 323, 190 S. E. 2d 333 (1972). The North Carolina Supreme Court in turn reversed the Court of Appeals and reinstated the summary judgment. 282 N. C. 530, 193 S. E. 2d 911 (1973). We granted certiorari, 414 U. S. 907 (1973). We affirm.

Petitioners concede that the Taft-Hartley amendments exclude supervisors from the protection of the Act. And it is undisputed that petitioners' status as "supervisors" has been settled by the determinations of the Regional Director and General Counsel of the NLRB. See n. 3, *supra*; *Hanna Mining* v. *Marine Engineers*, *supra*, at 190; Brief for Respondents 7. The Act therefore did not protect petitioners against discharge by Food Fair solely because of their membership in Local 525. *Oil City Brass Works* v. *NLRB*, 357 F. 2d 466 (CA5 1966); *NLRB* v.

[3] The position of the General Counsel was unequivocally set forth in the letter of denial, quoted by the North Carolina Court of Appeals: "Your appeal in the above matter has been duly considered. The appeal is denied. The four alleged discriminatees involved herein were supervisors within the meaning of Section 2 (11) of the Act and hence were not entitled, in the circumstances herein, to the protection of the Act." 15 N. C. App. 323, 325, 190 S. E. 2d 333, 334 (1972).

Fullerton Publishing Co., 283 F. 2d 545 (CA9 1960). See *NLRB* v. *Inter-City Advertising Co.*, 190 F. 2d 420 (CA4 1951); *NLRB* v. *Griggs Equipment, Inc.*, 307 F. 2d 275 (CA5 1962); *NLRB* v. *Big Three Welding Equipment Co.*, 359 F. 2d 77 (CA5 1966); Brief for Petitioners 8–9.

Our inquiry is thus narrowed to the determination of whether Congress, in addition to denying the protections of the federal law to supervisors discharged for union membership, should be taken as having also precluded North Carolina from affording petitioners its state damages remedy for such discharges. Section 14 (a) does not wholly foreclose state regulations respecting the status of supervisors, but its two clauses require individualized consideration in view of the Court of Appeals' reliance on *Hanna Mining*. *Hanna*, construing the first clause—"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization"—held that "certainly Congress made no considered decision generally to exclude state limitations on supervisory organizing," 382 U. S., at 190. The Court accordingly held that the Wisconsin anti-picketing statutes—that furthered, not hindered, the Act's limitations—could be applied to activity by a union of supervisors.

That construction, of course, is consistent with the objectives of the section. But the second clause is a broad command that no employer shall be compelled to treat supervisors as employees for the purpose of "any law, either national or local, relating to collective bargaining." Consistently with this broader command, and *Hanna*'s further statement that "Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees," 382 U. S., at 189, the North Carolina Supreme Court concluded that §§ 95–81 and 95–83 of the State's Right-

to-Work law contravened the congressional objective. That court held: "To permit a state law to deprive an employer of his right to discharge his supervisor for membership in a union would completely frustrate the congressional determination to leave this weapon of self-help to the employer." 282 N. C., at 541, 193 S. E. 2d, at 918.

Petitioners argue, however, that Congress must have meant that the reach of the limitation of the second clause that "no employer . . . shall be compelled to deem . . . supervisors as employees for the purpose of any law, either national or local, relating to *collective bargaining*" (emphasis supplied) did not bar state damages remedies for the discharge of supervisors for union membership but was a limited prohibition against state regulations that compel the employer to bargain collectively with unions that include supervisors as members. The legislative history of § 14 (a), read with its companion amendments, §§ 2 (3) and 2 (11), satisfies us that Congress embraced laws like North Carolina's §§ 95–81 and 95–83 within the prohibition against "any [local] law . . . relating to collective bargaining."

Section 2 (3) of the National Labor Relations Act before the 1947 Taft-Hartley amendments provided that "[t]he term 'employee' shall include any employee . . . ." 49 Stat. 450. The NLRB, after much vacillation,[4] interpreted this term as including supervisors. *Packard*

[4] The Board initially held that supervisors may organize in independent or affiliated unions, *Union Collieries Coal Co.*, 41 N. L. R. B. 961 (1942); *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874 (1942). Then, following introduction of proposed corrective legislation, see H. R. Rep. No. 245, 80th Cong., 1st Sess., 13 (1947), the Board announced that it would not find any organization of supervisors an appropriate bargaining unit, *Maryland Drydock Co.*, 49 N. L. R. B. 733 (1943). Finally, in *Packard Motor Co.*, 61 N. L. R. B. 4 (1945), the Board reverted to its initial position.

Motor Car Co. v. *NLRB*, 330 U. S. 485 (1947), sustained the Board. Congress reacted by amending §§ 2 (3) and 2 (11), and enacting § 14 (a) for the express purpose of relieving employers of obligations under the Act when supervisors, if employees under the Act, would be the focus of concern. *Hanna Mining* v. *Marine Engineers, supra,* at 188. Those amendments were the product of compromise of H. R. 3020 and S. 1126, 80th Cong., 1st Sess. (1947). There were differences in the specific provisions addressed to supervisory employees,[5] but no difference in objective. Employers were not to be obliged to recognize and bargain with unions including or composed of supervisors,[6] because supervisors were manage-

[5] Although H. R. 3020 lacked a counterpart to § 14 (a) in S. 1126, it contained a more detailed, and expansive, definition of "supervisor," including individuals with "hire-and-fire" authority, those who worked in "labor relations, personnel, employment, police, or time-study matters . . . or who [are] employed to act in other respects for the employer in dealing with other individuals employed by the employer," and those with access to information "of a confidential nature." § 101, amending § 2 (12) of NLRA, H. R. 3020, 80th Cong., 1st Sess. (1947).

Aside from the use of the Senate's proposals for §§ 2 (3), 2 (11), and 14 (a) in the final amendments, the only pertinent congressional action during passage was the addition of the words "or responsibility to direct them" to § 2 (11) on the floor of the Senate. 93 Cong. Rec. 4677–4678 (1947).

[6] The legislative history is determinative of any contention that a different rule should be applied for unions composed entirely of supervisors, on the one hand, and for unions of the rank and file as well as supervisors, on the other. The House Report emphatically stated:

"If management is to be free to manage American industry as in the past and to produce the goods on which depends our strength in war and our standard of living always, then *Congress must exclude foremen from the operation of the Labor Act, not only when they organize into unions of the rank and file and into unions affiliated with those of the rank and file, but also when they organize into*

ment obliged to be loyal to their employer's interests, and their identity with the interests of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation. Thus the House Report stated:

> "*Management, like labor, must have faithful agents.*—If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations." H. R. Rep. No. 245, 80th Cong., 1st Sess., 16 (1947).

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unions that claim to be independent of the unions of the rank and file." H. R. Rep. No. 245, 80th Cong., 1st Sess., 15 (1947) (emphasis in original.)

The Senate Report displays equally careful consideration and firm rejection of such a distinction:

"Before formulating this definition [in § 2 (11)], the committee considered a proposal, occasionally advanced, which would have limited the protection of foremen to joining or organizing unions whose membership was confined to supervisory personnel and not affiliated with either of the major labor federations. After considerable discussion, the committee decided that any such compromise would be completely unrealistic. There is nothing in the record developed before this committee to justify the conclusion that there is such a thing as a really independent foremen's organization." S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947).

Further:

> "The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness,' changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust." *Id.*, at 17 (emphasis in original).

The same theme—that unionizing supervisors threatened realization of the basic objectives of the Act to increase the output of goods in commerce by promoting labor peace—is repeated in the Senate Report. The Report refers to the NLRB rulings that included supervisors as protected employees as

> "[a] recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process . . . .
>
> "The folly of permitting a continuation of this policy is damatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protection of the act. Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled." S. Rep. No. 105, 80th Cong., 1st Sess. 3, 4 (1947).

This history compels the conclusion that Congress' dominant purpose in amending §§ 2 (3) and 2 (11), and enacting § 14 (a) was to redress a perceived imbalance in

labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests. See generally *NLRB* v. *Bell Aerospace Co.*, *ante*, p. 267. We conclude, therefore, that the second clause of § 14 (a) relieving the employer of obligations under "any law either national or local, relating to collective bargaining" applies to any law that requires an employer "to accord to the front line of management the anomalous status of employees." S. Rep. No. 105, *supra*, at 5. Enforcement against respondents in this case of §§ 95–81 and 95–83 would plainly put pressure on respondents "to accord to the front line of management the anomalous status of employees," and would therefore flout the national policy against compulsion upon employers from either federal or state agencies to treat supervisors as employees. Cf. *Teamsters Union* v. *Morton*, 377 U. S. 252, 258–260 (1964).[7]

Affirmed.

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[7] Petitioners also argue that § 14 (b) supports their contention. That section provides that "[n]othing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." The section obviously has no relevancy to the provisions of §§ 95–81 and 95–83. It is relevant primarily to § 95–79, which declares illegal certain agreements making union membership a condition of employment. See *Retail Clerks* v. *Schermerhorn*, 373 U. S. 746 and 375 U. S. 96 (1963); *Algoma Plywood Co.* v. *Wisconsin Board*, 336 U. S. 301 (1949).